CLERK'S OFFICE 2716

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 244.

HORACE B. DUNBAR, PLAINTIFF IN ERROR,

vs.

LOTTIE E. DUNBAR.

IN ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

FILED FEBRUARY 18, 1903.

(18,407.)

27163

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 15, 1902.

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1 *Citation on Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Lottie E. Dunbar, of Boston, in the county of Suffolk and Commonwealth of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear in the United States Supreme Court in the city of Washington District of Columbia on the twenty-eighth day of February next, pursuant to a writ of error filed in the clerk's office of the superior court for the county of Suffolk and Commonwealth of Massachusetts wherein Horace B. Dunbar of Seattle in the State of Washington is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Albert Mason chief justice of the superior court of Massachusetts, this first day of February, in the year of our Lord one thousand nine hundred and two.

[Seal of the Superior Court.]

ALBERT MASON,
Chief Justice of Superior Court.

2 BOSTON, MASS., 6 *February, A. D.* 1902.

Due and sufficient service of the within citation is hereby acknowledged.

LOTTIE E. DUNBAR,
By her attorney, FRANK H. STEWART.

3 UNITED STATES OF AMERICA, *ss:*

[Seal of the Circuit Court, Massachusetts.]

The President of the United States to the honorable the judges of the superior court of the Commonwealth of Massachusetts, holden at Boston, within and for the county of Suffolk, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said superior court before you, or some of you, being the highest court of law or equity of the State of Massachusetts in which a decision could be had in the suit between Lottie E. Dunbar plaintiff and Horace B. Dunbar defendant, in an action at law wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of, or authority exercised under, said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a

treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Horace B. Dunbar as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the twenty-eighth day of February next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and custom of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the first day of February in the year of our Lord one thousand nine hundred and two.

ALEX. H. TROWBRIDGE,
Clerk of the Circuit Court of the United States,
District of Massachusetts.

Allowed by—
ALBERT MASON,
Chief Justice Superior Court.

4 COMMONWEALTH OF MASSACHUSETTS, } ss:
Suffolk, Boston, 5th February, A. D. 1902, }

And now, here, the judges of the superior court in and for said county of Suffolk make return of this writ by annexing hereto and sending herewith, under the seal of the said superior court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof, I Joseph A. Willard clerk of said superior court have hereto set my hand and the seal of said court this fifth day of February A. D. nineteen hundred two.

[Seal of the Superior Court.]

JOS. A. WILLARD, *Clerk.*

5 COMMONWEALTH OF MASSACHUSETTS, } ss:
Suffolk, }

At a sitting of the superior court begun and holden at Boston within and for the county of Suffolk, on the first Tuesday of January A. D. 1902.

LOTTIE E. DUNBAR, of said Boston, Plaintiff, Appellant,
versus
HORACE B. DUNBAR, Cormorant of said Boston, Defendant. } 4632.

In an action of contract.

And the plaintiff says the defendant made a contract in writing a copy of which is hereto annexed marked "A," whereby the defendant promised to pay the plaintiff the sum of five hundred ($500) yearly for her support and maintenance, and four hundred dollars ($400) yearly for the support and maintenance of her child, Willie W. Dunbar. And the plaintiff says the defendant owes her under said contract the sum of seven hundred forty-nine dollars and ninety cents ($749.90) according to the account hereto annexed marked "B."

Copy Annexed.

"A."

Controversies having arisen concerning the agreement heretofore made between Horace B. Dunbar and Lottie E. Dunbar in September, 1889; in consideration of said Lottie E. Dunbar's forbearing of suit on such controversies, and in settlement of all such controversies and in substitution of said agreement of September 1889
6 and in further consideration of the release by Lottie E. Dunbar and in satisfaction of all claims under said original agreement.

That Horace B. Dunbar will pay to Lottie E. Dunbar during her life, or until she marries, for her maintenance and support, yearly, the sum of five hundred dollars, and will pay to her yearly for the support and maintenance of her child Harry H. Dunbar the sum of four hundred dollars until he shall attain the age of twenty-one years; and shall pay to her yearly for the support and maintenance of her child Willie W. Dunbar the sum of four hundred dollars until he shall attain the age of twenty-one years, all said sums to be paid in equal monthly installments between the first and tenth of each and every month—the first installment being for the month of May, 1896, shall be paid between the first and tenth of June, 1896.

And in addition to the foregoing said Horace B. Dunbar agrees to pay the further sum of one hundred dollars between the first and tenth of July, 1896, over and above the installment otherwise due for said month.

And the said Lottie E. Dunbar hereby agrees that she has not nor shall she have any other claim or demand against Horace B. Dunbar for contribution to her support and maintenance or for the support or education of said children save and except as fixed and limited by this agreement.

(Signed) HORACE B. DUNBAR. [SEAL.]
LOTTIE E. DUNBAR. [SEAL.]

Witness.
(Signed) GUSTAVUS H. WALD,
FRANK H. STEWART,
To L. E. D.

7 *Account Annexed.*

"B."

BOSTON, *Oct.* 2, 1899.

Horace B. Dunbar to Lottie E. Dunbar, Dr.

1. To installments due under covenant for alimony from December, 1898, to Oct. 1, 1899, 10 months at $41.66 a month	$416.60
2. To monthly allowance due her for support and maintenance of Willie W. Dunbar, from December, 1898, to Oct. 1, 1899, 10 months at $33.33 a month	333.30
3. Total	$749.90

To the damage of the said plaintiff, (as she says) the sum of one thousand dollars.

The writ in this case is dated October second A. D. 1899, and was duly entered in the municipal court of the city of Boston, on the fourteenth day of said October 1899, wherein on the eighteenth day of said October, 1899, said defendant filed his answer and his plea of discharge in insolvency and also amended his said answer, both as on file. Afterwards the plaintiff amended, by leave, her declaration so that the said copy annexed marked "A," shall read as follows, to wit:

"Controversies having arisen concerning the agreement heretofore made between Horace B. Dunbar and Lottie E. Dunbar in September, 1899; in consideration of said Lottie E. Dunbar's forbearance of suit on such controversies, and in settlement of all such controversies and in substitution of said agreement of Septem-
8 ber 1889 and in further consideration of the release by Lottie E. Dunbar and in satisfaction of all claims under said original agreement, Horace B. Dunbar agrees with the said Lottie E. Dunbar as follows:

That said Horace B. Dunbar will pay to Lottie E. Dunbar during her life, or until she marries, for her maintenance and support, yearly the sum of five hundred dollars, and will pay to her yearly for the support and maintenance of her child Harry H. Dunbar the sum of four hundred dollars until he shall attain the age of twenty-one years; and shall pay to her yearly for the support and maintenance of her child Willie W. Dunbar the sum of four hundred dollars until he shall attain the age of twenty-one years, all said sums to be paid in equal monthly installments between the first and tenth of each and every month—the first installment being for the month of May, 1896, shall be paid between the first and tenth of June, 1896.

And in addition to the foregoing said Horace B. Dunbar agrees to pay the further sum of one hundred dollars between the first and tenth of July, 1896, over and above the installment otherwise due for said month.

And the said Lottie E. Dunbar hereby agrees that she has not nor shall she have any other claim or demand against Horace B. Dunbar

for contribution to her support and maintenance or for the support maintenance or education of said children save and except as fixed and limited by this agreement.

(Signed) HORACE B. DUNBAR. [SEAL.]
LOTTIE E. DUNBAR. [SEAL.]

Witness-:
(Signed) GUSTAVUS H. WALD,
FRANK H. STEWART,
To L. E. D.

9 And after trial in said court, a single justice presiding without a jury, said court found for the defendant.

It was therefore considered by said municipal court on the twenty-second day of December, A. D. 1899, that said Horace B. Dunbar, defendant as aforesaid, recover against said Lottie E. Dunbar, plaintiff, as aforesaid, his costs of suit taxed at nine dollars and thirteen cents.

From which said judgment the said plaintiff appealed to this court on the first Monday of January, 1900, when she duly appeared by Frank H. Stewart, her attorney and entered the above appeal: said defendant appeared by George F. Williams, and James A. Halloran, his attorneys.

Thence the case was continued to the April sitting in said year, when the defendant amended by leave and consent, his answer as on file.

And the case was submitted to the court.

Whereupon after a full hearing the court found for the plaintiff and assessed damages in the sum of four hundred twenty-nine dollars and four cents.

And thereupon the plaintiff, by her said attorney, alleged sundry exceptions to the ruling and opinions of the court in certain matters of law.

Thence the case was continued to the July sitting 1900, when the defendant by his said attorneys, alleged sundry exceptions to the ruling and opinion of the court in certain matters of law.

10 Thence the case was continued to the October sitting 1900, when the case was reported to the supreme judicial court for the Commonwealth by the presiding judge for the consideration by said court of the law in the same.

Thence the case was continued to await the decision of said court from sitting to sitting to the October sitting, 1901, when on the thirty-first day of December in said year, it was ordered by said supreme judicial court for the Commonwealth, by its rescript, that the clerk of said superior court for said county of Suffolk, make the following entry under said case, in the docket of said court, viz.—

"Judgment to be entered for the plaintiff for both branches of her claim."

Thence the case was continued to the present January sitting, 1902.

And now on the sixth day of January, A. D. 1902, it is considered by the court that said Lottie E. Dunbar, plaintiff as aforesaid, re-

cover against said Horace B. Dunbar, defendant as aforesaid, the sum of eight hundred fifty-one dollars and sixty cents damages and costs of suit taxed at sixty-seven dollars and eighteen cents.

And thereafterwords, to wit on the first day of February, 1902, said defendant files his suggestion and notice of his intention to sue out a writ of error in the Supreme Court of the United States.

Whereupon upon said first day of February, 1902, upon petition of said defendant, a writ of error is granted and issued to the Supreme Court of the United States, accordingly.

Attest; *Attest:*

[Seal of the Superior Court.]

JOS. A. WILLARD, *Clerk.*

[Endorsed:] 4632. Lottie E. Dunbar *v.* Horace B. Dun-
11 bar. Transcript of record.

12 BOSTON, MASS., *January* 31, *A. D.* 1902.

I hereby approve the amount of the penalty of the within bond at eighteen hundred dollars.

FRANK H. STEWART,
Attorney for Lottie E. Dunbar.

United States Supreme Court.

Bond on Writ of Error.

Know all men by these presents, that we, Horace B. Dunbar of Seattle in the State of Washington, as principal, and American Surety Company of New York, as surety, are held and firmly bound unto Lottie E. Dunbar in the full sum of eighteen hundred ($1800) dollars to be paid to the said Lottie E. Dunbar, her certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, by these presents.

Sealed with our seals and dated this 30th day of January in the year of our Lord one thousand nine hundred and two.

Whereas, lately in the superior court for the county of Suffolk and State of Massachusetts in a suit depending in said court, between said Lottie E. Dunbar and said Horace B. Dunbar judgment was rendered against the said Horace B. Dunbar and the said Horace B. Dunbar having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Lottie E. Dunbar citing and admonishing her to be and appear in the Supreme Court of the United States at Washington on the twenty-eighth day of February next.

Now the condition of the above obligation is such, that if the said Horace B. Dunbar shall prosecute his writ of error to effect, and answer all damages and costs if he fail to make his plea good, then

the above obligation to be void; else to remain in full force
13 and virtue.

HORACE B. DUNBAR. [SEAL.]
AMERICAN SURETY COMPANY
OF NEW YORK,
[CORPORATE SEAL.] By S. N. ALDRICH,
Its Resident Vice-President, and
WALLACE H. HAM,
Its Resident Assistant Secretary.

Sealed and delivered in presence of
THOMAS B. HARDIN,
For H. B. D.

Approved:
ALBERT MASON,
Chief Justice of Superior Court.

Copy.
Attest: JOS. A. WILLARD, *Clerk.*

14 [Endorsed:] 4632 9 Horace B. Dunbar appellant in error *vs.* Lottie E Dunbar appellee in error. Appeal bond. 4 Feb. 1902. Copy.

15 COMMONWEALTH OF MASSACHUSETTS, *Suffolk,* } *ss:*

Superior Court.

LOTTIE E. DUNBAR, Appellee in Error,
vs.
HORACE B. DUNBAR, Appellant in Error. } Petition for Writ of Error.

To the honorable the superior court:

Your petitioner, Horace B. Dunbar, formerly of Cincinnati in the State of Ohio, now of Seattle in the State of Washington, shows unto your honors that heretofore, to wit, on the sixth *say* of January A. D. 1902, at Boston in the said county of Suffolk, upon an action at law in which Lottie E. Dunbar of said Boston was plaintiff and your petitioner was defendant, final judgment was entered against your petitioner in the superior court within and for the county of Suffolk aforesaid after a trial without a jury of said cause in said superior court resulting in said court finding and ordering judgment for said Lottie E. Dunbar as appears of record therein; that afterwards said finding and said cause were reported by said superior court to the supreme judicial court where said cause was duly heard and determined against your petitioner as aforesaid, and said final judgment was entered as aforesaid in said superior court in accordance with the order of said supreme judicial court, said su-
16 perior court being the highest court of law in said Commonwealth in which a decision could be had in said suit as appears by the records of said superior court, and the amount of

said judgment exceeds the sum of five hundred dollars, and if sustained compels the payment of a sum in excess of five thousand dollars.

And your petitioner says that in the trial of said case there was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity, and wherein was drawn in question the validity of a statute of, and authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties and laws of the United States, and the decision was in favor of such their validity and against the contention and interest of your petitioner; and wherein was drawn in question the construction of a clause of the Constitution, and of a treaty and statute of, and commission held under the United States, and the decision was against the title, right, privilege and exemption specially set up and claimed under such clause of the said Constitution, treaty, statute and commission by your petitioner in the said trial as more particularly appears by the pleadings therein and the record thereof, and a manifest error hath happened to the great damage of your petitioner, and your petitioner shows said error in his assignment of errors hereto annexed and made a part of this petition.

Wherefore, your petitioner prays that a writ of error, to the
17 Supreme Court of the United States may issue in due form of law and he will ever pray.

HORACE B. DUNBAR,
By his attorneys, GEO. FRED WILLIAMS,
JAMES A. HALLORAN.

LOTTIE E. DUNBAR, Appellee in Error,
v.
HORACE B. DUNBAR, Appellant in Error.

Assignment of Errors in the Matter of the Petition of Horace B. Dunbar, Appellant.

On this sixteenth day of January, A. D. 1902 comes the said Horace B. Dunbar by Geo. Fred Williams and James A. Halloran, his attorneys, and shows that in the record and proceedings in the case of Lottie E. Dunbar *v.* Horace B. Dunbar, wherein a final judgment was entered against said Horace B. Dunbar, appellant, in the superior court within and for the county of Suffolk and Commonwealth of Massachusetts, in an action at law had between said Lottie E. Dunbar and Horace B. Dunbar, there is manifest error in this, to wit:

1. That the supreme judicial court for said Commonwealth erred in its finding, ruling and order that the discharge of the petitioner Horace B. Dunbar in bankruptcy under the national bankruptcy law of 1898 did not operate as a full and complete bar to the right of said Lottie E. Dunbar to recover on her claim in respect to, and as a release from

18 (*a*.) Instalments due to said Lottie E. Dunbar for the support and maintenance of said Lottie E. Dunbar.

(*b*.) Instalments due for the support and maintenance of Lootie E. Dunbar's son Willie W. Dunbar.

In consequence of which final judgment in the superior court for Suffolk county in said Commonwealth was entered for said plaintiff, Lottie E. Dunbar.

2. That the supreme judicial court for said Commonwealth erred in its finding, ruling and order that th claim of the plaintiff, Lottie E. Dunbar, was not a debt provable in the bankruptcy proceedings of the petitioner, Horace B. Dunbar, from which he was released by his discharge, in consequence of which final judgment in the superior cpurt for Suffolk county in said Commonwealth was entered for said plaintiff, Lottie E. Dunbar.

3. The supreme judicial court erred in its finding, ruling and order that the obligations imposed upon the petitioner, Horace B. Dunbar by his contract of 1896, were conti-gent claims within the meaning of the national bankruptcy law of 1898, both as to (*a*) instalments due to plaintiff, Lottie E. Dunbar, for the support and maintenance of said Lottie E. Dunbar, and (*b*), instalments due to the plaintiff Lottie E. Dunbar for the support and maintenance of her son, Willie W. Dunbar, in consequence of which final judgment in the superior — for Suffolk county in said Commonwealth was entered for said plaintiff, Lottie E. Dunbar.

HORACE B. DUNBAR,
By his attorneys, GEO. FRED WILLIAMS &
JAMES A. HALLORAN.

Copy.
Attest: JOS. A. WILLARD, *Clerk*.

19 [Endorsed:] 4632 8 Commonwealth of Mass. Suffolk, *ss:* Superior court. Lottie E. Dunbar appellee in error *v.* Horace B. Dunbar p't'r & appellant in error Copy. Petition for writ of error to the United States Supreme Court. Writ of error granted & iss'd Feb. 1, 1902. E Suffolk clerk's office Filed 1 1902 Feb. Jos. A. Willard cl'k superior court From the office of Geo. Fred Williams & James A. Halloran # 209 Washington St. Boston—Mass. Room 50.

20 COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss:*

Superior Court.

LOTTIE E. DUNBAR
vs.
HORACE B. DUNBAR.

And now comes the defendant in the above-entitled case and represents that it is his intention to sue out a writ of error in the Supreme *judicial* Court of the United States.

By his attorney, GEO. FRED WILLIAMS.

Copy,
Attest: JOS. A. WILLARD, *Clerk*.

21 [Endorsed:] 4632 7 Suffolk, *ss:* Superior court. Lottie E. Dunbar *vs.* Horace B. Dunbar Copy. Defendant's notice of intension to sue out writ of error in the Supreme Court of the United States E Suffolk clerk's office Filed 1902, 4 Jan. Jos. A. Willard, cl'k superior court. From the office of Geo. Fred Williams 209 Washington St. Boston.

22 COMMONWEALTH OF MASSACHUSETTS:

BOSTON, *February* 12, 1902.

I certify the annexed to be a true copy of the opinion of the supreme judicial court in the case of Lottie E. Dunbar *vs.* Horace B. Dunbar decided on the thirty-first day of December, 1901.

HENRY W. SWIFT,
Reporter of Decisions.

23 BARKER, *J.:*

The action is in contract to recover ten instalments of $74.99 each, alleged to be due to the plaintiff in part for her own support and in part for that of her minor son, under a sealed instrument executed by herself and the defendant in the year 1896. After a ruling that so much of the demand as related to the support of the son was barred by the defendant's discharge in bankruptcy, and a finding for the plaintiff for so much as related to her own support, and an order of judgment for the plaintiff upon the finding, the case comes here upon a report which states some facts that seem to have been admitted or not disputed at the trial, and upon the evidence there introduced. The court below refused to rule that upon all
24 the evidence the plaintiff was not entitled to recover, and also refused to rule that the discharge in bankruptcy was not a bar to any part of the claim; and ruled that the discharge was a bar to so much of the demand as was alleged to be due for the support of the son. By the terms of the report, if the rulings were right the judgment is to be affirmed; otherwise, such judgment is to be entered as law and justice may require.

The defendant's contentions are that his discharge in bankruptcy is a bar to the suit, and also that the agreement sued upon was without consideration; and further, that the agreement is void, because in substitution for an earlier one founded upon a collusive arrangement to enable him to procure a divorce from the plaintiff.

It is immaterial whether there was collusion in the divorce suit, and whether the agreement of September, 1889, was invalid by reason of such collusion or for want of consideration. That agreement was made and performed by the defendant for several years. When he broke it the plaintiff asserted that it was valid and binding, and the agreement of 1896, now sued on, was made in settlement of the controversy so arising. The compromise of this controversy was a sufficient consideration for the agreement of 1896.

Medway v. Milford, 21 Pick. 349, 353. *Barlow v. Ocean Ins.*
25 *Co.* 4 Met. 270, 275. *Cobb v. Arnold*, 8 Met. 403, 405. *Tuttle v. Tuttle*, 12 Met. 551, 554. *Allis v. Billings*, 2 Cush. 19, 26.

Whitney v. Haverhill Ins. Co. 9 Allen, 35. *Easton v. Easton*, 112 Mass. 438, 443. *Cutter v. Cochrane*, 116 Mass. 408. *Rollins v. Marsh*, 128 Mass. 116, 120. *Dean v. Skiff*, 128 Mass. 174.

As there was an actual consideration for the agreement of 1896, it is immaterial whether it was to be construed as entered into in Ohio or in Massachusetts.

Whether the bankruptcy act of 1898 allows the proof of contingent claims must depend finally upon the construction of the statute by the Federal courts. This court in *Morgan v. Wordell*, 178 Mass. 350, expressed the opinion that one class of contingent claims was not so provable, and in *Goding v. Rosenthal*, (61 N. E. Rep. 222,) followed that expression of opinion by a decision to the same effect. If claims of the nature then held to be not provable are not provable, we see no ground for holding either class of obligations imposed upon the defendant by his contract of 1896 to be provable.

The result is that the defendant's discharge in bankruptcy was not a bar to either branch of the plaintiff's claim now in suit;
26 and that the plaintiff should have judgment for all of the unpaid instalments declared for, with interest and costs.

So ordered.

Copy
Att. JOS. A. WILLARD, *Clerk.*

26½ [Endorsed:] Dunbar *vs.* Dunbar Certified copy of the opinion of the supreme judicial court.

27 (Copy.)

COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court for the Commonwealth, at Boston, Dec. 31, 1901.

In the case of—

LOTTIE E. DUNBAR
vs.
HORACE B. DUNBAR

pending in the superior court for the county of Suffolk,

Ordered, that the clerk of said court in said county make the following entry under said case in the docket of said court, viz.:

Judgment to be entered for the plaintiff for both branches of her claim.

J. M. B.
Dec. 31, 1901.
By the court:

HENRY A. CLAPP, *Clerk.*

Copy,
Att.: JOS. A. WILLARD,
Clerk of Superior Court.

28 *Brief Statement of the Grounds and Reasons of the Decision.*

1. The question of collusion was immaterial and also the question whether the original agreement was void for collusion in obtaining the divorce or for want of consideration, and as the agreement sued on had a sufficient consideration in the compromise of the controversy as to the previous agreement whether the agreement sued on was to be considered as made here or elsewhere was also immaterial.

2. Contingent claims are not provable under the bankruptcy act of 1898 and hence no part of the plaintiff's claim is barred by the defendant's discharge.

29 [Endorsed:] 6. No. 4632. Supreme judicial court. For the Commonwealth. Rescript Suffolk county Lottie E. Dunbar *vs.* Horace B. Dunbar. Copy. E Suffolk clerk's office Filed 1901 31 Dec. Jos. A. Willard cl'k superior court.

30 COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss:*

Docket Entries.

Superior Court.

Frank H. Stewart.
J. O. Teele.
Geo. Fred Williams.
Jas. A. Halloran.
April 4, 1900.

LOTTIE E. DUNBAR
vs.
HORACE B. DUNBAR. } 4632.

Answer. Plea of discontinuance in bankruptcy.
Amended answer and plaintiff's amended declaration below.
1900, April.—Defendant's motion to amend answer allowed.
Court finds for plaintiff for $429.04. Plaintiff proposed exceptions (4) Time for filing defendant's exceptions extended to August 1, 1900.
1900, Aug. 31.—Defendant's proposed exceptions
" Oct. 25.—Report to supreme judicial court (5)
1901, 31 Dec.—Rescript Judgment to be entered for the plaintiff for both branches of her claim (6)
1902, Jan. 4.—Notice of defendant's intention to sue out a writ of error in supreme judicial court of United States.
1902, Feb. 1.—Petition for writ of error to United States Supreme Court (8) and writ of error granted and issued. Bond filed to prosecute etc.
Copy,
Attest: JOS. A. WILLARD, *Clerk.*

31 [Endorsed:] 4632 Dunbar *vs.* Dunbar Docket entries Copy.

32 COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } ss:

Superior Court.

LOTTIE E. DUNBAR
v.
HORACE B. DUNBAR.

Report.

This was an action of contract to recover for ten months' instalments of $74.99 each, which were alleged to be due and payable to the plaintiff for the support and maintenance of the plaintiff and the plaintiff's son, Willie W. Dunbar, under an instrument in writing under seal, as set forth in the plaintiff's declaration. The pleadings are made a part hereof.

At the trial before the court without a jury, it was admitted by the counsel for the plaintiff that the defendant was duly discharged in bankruptcy on April 24, A. D. 1899, and that the plaintiff's claim under the instrument in suit was proved for the instalments that had accrued up to and were unpaid at the date of the adjudication in bankruptcy.

It is further admitted and agreed that there was a divorce granted to the defendant in Ohio from the plaintiff, on the ground of her desertion, which became absolute as soon as the court granted it on August 8, 1889.

The record of the divorce proceedings, duly certified and authenticated, was produced and put in evidence. From this record it appeared that at a separate session of the court of common pleas of Hamilton county, Ohio, in and for the first judicial district, held at the court-house in the city of Cincinnati, county of Hamilton and State of Ohio, in the term of July, A. D. 1889, before the Honorable Clement Bates, one of the judges of said court, Horace B. Dunbar, plaintiff therein, filed in the office of the clerk of said court, on the 22d day of June, A. D. 1889, his petition for divorce and precipe against Lottie E. Dunbar, defendant therein, in which petition he set forth his residence in Ohio, in the county of Hamilton; that on or about August 19th, A. D. 1871, he was married to the defendant at Boston, Mass., and that there were then living with the defendant children of their said marriage, one boy, Harry, aged twelve years,
and one boy, Willie W., aged nine years; that plaintiff had
33 been faithful to his marital duties, but that defendant had, in disregard of her marital duties, been wilfully absent for more than three years last past from the plaintiff. Wherefore, the plaintiff prayed that he might be divorced from the defendant, and have such other relief as was proper. L. K. Torbet appeared as attorney for the plaintiff.

It further appeared from said record that on said 22d day of June, A. D. 1889, the affidavit of said Horace B. Dunbar was filed in the office of the clerk of said court, setting forth that the service of the summons could not be made on the defendant, she being a non-

resident and living at Ashburnham, Mass., and not then in the State of Ohio.

And afterwards, to wit, on the 28th day of June, A. D. 1889, the sheriff of said Hamilton county filed in the clerk's office of said court, and made due return of said summons, with a return endorsed thereon as follows: "Cincinnati, June 27th, 1889. The within-named defendant not found. Leo Schott, sheriff, by Geo. W. Draper, deputy."

And afterwards, to wit, on the 28th day of June, A. D. 1889, proof of publication was filed in the office of the clerk of said court as follows: "Legal notice, court of common pleas, Hamilton county, Ohio. Case No. 84290, *Horace B. Dunbar v. Lottie E. Dunbar.* The above-named defendant, whose last-known place of residence was Ashburnham, Mass., is hereby notified that the plaintiff herein on the 22d day of June, 1889, filed his petition in this case, praying for a divorce upon the grounds of wilful absence of the defendant for three years last past; the defendant is notified to answer or demur to said petition within six weeks from June 24th, 1889, the date of the first publication of this notice, or this cause will stand for trial and decree. Signed, L. K. Torbet, attorney for plaintiff."

On the 28th day of June, A. D. 1889, J. B. Peaslee, clerk, by W. H. Sargent, deputy, certified under his hand and the seal of the court, that he mailed a copy of the above publication together with a copy of petition and original summons to Lottie E. Dunbar, Ashburnham, Worcester county, Mass.

And it further appeared from said record that afterwards, to wit, on the 6th day of August, A. D. 1889, an order of court was made and entered on the court journal setting forth that the plaintiff by his attorney offered proof of publication, of the pendency and prayer of the petition for divorce, and the court finds said publication and proof in all respects regular and according to law, and hereby approves the same.

Then follows the affidavit of Geo. W. Cunningham, clerk of the publishers of the Evening *Post*, a newspaper printed and of general circulation in Hamilton county, Ohio, setting forth that the notice as above set forth had been published in said Evening *Post* for six consecutive Mondays, commencing on Monday, June 24th, 1889, and subscribed and sworn to before William H. Dicks, notary public, on August 6th, A. D. 1889.

34 And it further appeared from said record that afterwards, to wit, on the 9th day of August, A. D. 1889, the court made the following order, which was entered upon its journal:—

Court of Common Pleas of Hamilton County, Term of July, A. D. 1889.

HORACE B. DUNBAR, Plaintiff,
v.
LOTTIE E. DUNBAR, Defendant. } No. 84290. Decree of Divorce.

Now comes the plaintiff and the defendant having been legally summoned by publication and having failed to appear, the court find defendant in default for answer and demurrer to said petition

and find that the allegations thereof are confessed by defendent to be true.

The court also find that the plaintiff at the time of filing his petition, had been a resident of the State of Ohio for one year next preceding the same and was at the time a *bona fide* resident of this county of Hamilton, and that the parties hereto were married as in said petition set forth.

The court further find upon the evidence adduced that the defendant has been guilty of wilful absence for more than three years last past from plaintiff and that, by reason thereof, the plaintiff is entitled to a divorce as prayed for.

It is therefore ordered and adjudged by the court that the marriage contract heretofore existing between the said Horace B. Dunbar and Lottie E. Dunbar be and the same hereby is dissolved and both parties are released from the obligations of the same, that the custody of the children of such marriage, one boy, Harry H. Dunbar, aged 12 years, and Willie W. Dunbar, aged 9 years, be and the same are to remain in charge and under the control of the said Lottie *T.* Dunbar, the said Horace B. Dunbar to have the privilege of seeing said children at all reasonable times.

It is further ordered that the plaintiff pays the costs of this proceeding.

Early in May, 1889, and before the defendant's libel for divorce was filed, L. K. Torbet, of Cincinnati, Ohio, then defendant's attorney, came from Cincinnati, the home of the defendant, to Ashburnham, Mass., where the plaintiff was then living. Mr. Torbet was accompanied by a brother of the defendant. They made known to the plaintiff that the defendant was about to seek a divorce. After the matter had been discussed, as appears in evidence, the plaintiff and Mr. Torbet went to Concord, N. H., that Rt. Rev. Bishop Niles, of that city, might be consulted. A conference was had between Mr. Torbet and Bishop Niles, at the latter's home, on the 10th day of May, A. D. 1889. As a result of the conversation had at that time the letters, copies of which are hereto annexed as Exhibits 4, 5, 6, 7 and 8, were written. After the divorce had been granted to the defendant the letter, a copy of which is hereto annexed as Exhibit 9, was written by Mr. Torbet to Bishop Niles, and with this letter was enclosed the so-called green agreement, a copy of which is hereto annexed as Exhibit 1. In 1896 the payments under the so-
35 called green agreement were in arrears, and thereupon the instrument upon which this suit is brought, a copy of which is hereto annexed and marked "Exhibit 2," was executed. The plaintiff produced these Exhibits 1 and 2 at the trial. Payments were made as called for by these last instruments until some months prior to December 2d, A. D. 1898.

On December 2d, A. D. 1898, the defendant was adjudged a bankrupt on his voluntary petition in the United States district court in bankruptcy, southern district of Ohio, western division, and on April 24th, A. D. 1889, was discharged from all debts and claims which are made provable by the acts of Congress relating to bankruptcy against his estate, which existed on the 2d day of December,

A. D. 1898, except such debts as are here excepted by law from the operation of a discharge in bankruptcy, as appears from a certified copy of the bankruptcy proceedings which is made a part of defendant's answer.

It further appeared that the plaintiff, at the first meeting of the creditors of the defendant in bankruptcy proceedings, which was held before the referee appointed therein, appeared by an attorney, who produced and filed his power of attorney duly executed, and filed her claim for $691.63, for instalments due to December 2d, A. D. 1898. A transcript of the bankruptcy proceedings was put in evidence, from which it appeared that the plaintiff was named as a creditor in the bankruptcy schedule of the defendant as follows:—

Lottie E. Dunbar, Charlestown, Mass., Alimony due up to present time.	540.00
Lottie E. Dunbar, Charlestown, Mass., Alimony payable yearly.	1300.00

A power of attorney from Horace B. Dunbar to L. K. Torbet was produced and put in evidence, a copy of which is hereto annexed, marked "Exhibit 3."

The present action was brought to recover for instalments which accrued subsequent to the adjudication in bankruptcy. The evidence in the case is as follows.

The following evidence was introduced.

(The second agreement was offered in evidence, a copy of which is annexed as Exhibit 2.)

LOTTIE E. DUNBAR, the plaintiff:

Q. What is your name?
A. Lottie E. Dunbar.
Q. You are the plaintiff in the case?
A. I am.
Q. Do you remember when Horace B. Dunbar obtained a divorce from you?
A. I do.
36 Q. What was the first that you knew about those proceedings?
A. He sent a lawyer from Cincinnati.
Q. And what was the name of that lawyer?
A. Mr. L. K. Torbet.
Q. Is he present in court?
A. Yes, sir.
Q. Where did you meet Mr. Torbet?
A. First in Ashburnham.
Q. Where?
A. In Mrs. Davis' house, where I was boarding.
Q. Any one accompany Mr. Torbet?
A. Mr. Dunbar, the defendant's brother.
Q. What happened in Ashburnham? You had an interview in relation to the divorce case?

A. I did; and we spoke of Bishop Niles, and he said he would go to Bishop Niles and I would go with him; Concord, N. H.
Q. Who is Bishop Niles?
A. A mutual friend of Mr. Dunbar and myself.
Q. Did you go to Concord, N. H.?
A. I did.
Q. And did you there meet Mr. Torbet?
A. Yes, sir.
Q. Did you together there meet Bishop Niles?
A. No, sir.
Q. State what happened there.
A. Mr. Torbett had a long conversation with Bishop Niles.
Q. Were you present?
A. No, sir.
Q. What else took place?
A. I can't tell; only conversation took place between Mr. Torbet and the bishop and letters passed between Mr. Torbet and the bishop.
Q. And those letters came into your hands afterwards?
A. They came to the bishop and he sent them to me and I kept them and gave them to you.

COUNSEL FOR PLAINTIFF: We have some letters here which passed between Mr. Torbet and Bishop Niles.
The COURT: All preceding the agreement of '96?
COUNSEL FOR PLAINTIFF: Yes, sir.
The COURT: What is there to this case?
COUNSEL FOR DEFENDANT: I would suggest that there is a further defence beyond bankruptcy; the defence of want of consideration, and the illegality of the agreement. We claim it is an Ohio contract. The law there is directly to the contrary of what it is in Massachusetts.

Q. I will show you this instrument (Exhibit 2). Whose signatures are those?
A. Mr. Dunbar's.
Q. And whose is this?
A. My own.

The COURT: The execution of the contract declared on is admitted by the pleadings.

Q. Have you been paid any sums of money under this second agreement?
A. I have.
37 Q. Up to what time were you paid?
A. Until a year ago last June.
Q. A year ago last June, you say?
A. Yes, sir; two years this coming June.
Q. For what month was that due, do you remember?
A. I don't understand.
Q. What instalment of alimony were you not paid?
A. For the whole two years from May. The last I received was May, 1898. It will be two years this coming June.

Q. Then in December, 1898, you proved in bankruptcy?
A. Yes, sir.
Q. And since that time you have received no money at all?
A. No, sir.
Q. And does that also include the allowances that were to come to your son Willie?
A. Yes, sir.
Q. And Harry has become of age?
A. Yes, sir.
Q. When did Harry become of age?
A. He is twenty-two this last October, and Willie is two years younger.

COUNSEL FOR PLAINTIFF: If we are to rely strictly on this contract, we will not go further now.

Q. At the time this second agreement (*Exhibit* 2) was made, where were you living?
A. Boston; Charlestown.

Cross-examination of LOTTIE E. DUNBAR:

Q. Mrs. Dunbar, at the time this agreement was made, Mr. Stewart was your counsel, was he?
A. He was.
Q. Was Mr. Horace B. Dunbar in Boston?
A. No, sir; in Cincinnati.
Q. And with whom were the negotiations had that brought about this contract?
A. With Mr. Stewart.
Q. No; by whom with you in behalf of Mr. Dunbar?
A. Mr. Torbet.
Q. Is that true in regard to this 1896 contract?
A. Mr. Torbet had nothing to do with that.
Q. I am referring to that '96 contract signed by yourself and Mr. Dunbar. The first paper was only signed by Mr. Dunbar.
A. The green one; yes, sir.
Q. Now, this second one was signed by you and Mr. Dunbar; now do you recall that when this agreement was drawn up it was signed by you and then sent out to be signed by Mr. Dunbar?
A. Yes, sir.
Q. And Mr. Dunbar was then living in Ohio?
A. Yes, sir.
Q. So that it was signed by you and forwarded to him for signature, and later you got it back?
A. Yes, sir.
Q. Signed by him?
A. Yes, sir.
Q. And he had been living there for several years?
A. Yes, sir.
Q. And you expected that the payments which were to be made to you under these contracts were to be made by him from there?

A. Yes, sir.
Q. He was a hotel-keeper, was he not?
A. Yes, sir.
Q. And did send for some time the amounts that — set forth in this agreement?
A. Yes, sir.

COUNSEL FOR DEFENDANT: Now, your honor, with respect to the *lex* of this contract, I claim that that was an execution by Mr. Dunbar in Cincinnati, which completes that contract and places that contract in Ohio.

Redirect examination of LOTTIE E. DUNBAR:

Q. Was there more than one of these contracts, do you know?
A. I don't think so.
Q. How did you receive the money that was paid under this?
A. By check.
Q. How was that made payable?
A. To Lottie E. Dunbar, signed Horace B. Dunbar.
Q. Have you always been living in Massachusetts during this time?
A. Yes, sir.

(*Noon recess.*)

LOTTIE E. DUNBAR recalled for examination by counsel for defendant, and testified as follows:—

Q. You testified, Mrs. Dunbar, upon your direct examination, that the first you heard of the divorce proceedings was through the brother of Mr. Dunbar and Mr. Torbet?
A. Yes, sir.
Q. And when was it that this information first came to you?
A. That was the first. It was the 8th of August, I think.
Q. Wasn't it in May? The eighth of August was the date of the decree.
A. It was at the time he came to Ashburnham.
Q. Suppose we put that in the month of May. The correspondence will show that to be in May.
A. Yes, sir.
Q. It was previous to the writing of the letter by Mr. Dunbar or his attorney to Bishop Niles, and that was dated in May.
A. Yes, sir.
Q. Now, Mr. Torbet came to you?
A. Yes, sir.
Q. In Ashburnham?
A. Yes, sir.
Q. You were then residing there?
A. Yes, sir.
Q. And Mr. Dunbar was residing in Cincinnati, as you understood?
A. Yes, sir.

Q. What did Mr. Torbet say to you?

A. Said Mr. Dunbar wished to get a divorce.

39 Q. Upon what ground? Did he state?

A. No, he did not. He didn't state particularly. He said that he wanted a bill of divorce, and as I understood it was because I left him, but I came because he told me to. It wasn't intentional. I would have stayed if I could. I came for my boy's health.

Q. At that time you met Mr. Torbet alone or his brother and Mr. Torbet?

A. They were both together, Mr. Dunbar's brother and Mr. Torbet.

Q. It was suggested at that time that you wished to consult with Bishop Niles?

A. Mr. Torbet said that he would like to consult with Bishop Niles, and I went with Mr. Torbet.

Q. What were your relations at that time with Bishop Niles?

A. Mutual friends.

Q. Had you resided in the family of Bishop Niles?

A. Yes, sir.

Q. How long?

A. A number of years.

Q. In what way?

A. Like his own child; as one of his own family.

Q. Was that before you were married?

A. Yes, sir.

Q. How old were you when you were married?

A. I was 19, I think.

Q. And it was on account of your confidence in him and your pleasant relations with him that you consulted him?

A. Yes, sir.

Q. And Mr. Torbet suggested that you should go and consult with him, did he not?

A. Yes, sir.

Q. What discussion was had at that time concerning the divorce proceedings and what did Mr. Torbet want of you?

A. I hardly know how to answer that question.

(*This was objected to by counsel for plaintiff.*)

Mr. TEELE: It has already intimated that the correspondence appears between two of these parties.

COUNSEL FOR DEFENDANT: I am not trying to prove the writings now. I don't think it was in writing.

Q. What you had to say to Mr. Torbet in Ashburnham wasn't the letter which was drawn up in Concord?

A. No sir.

Q. You had a general discussion there in Ashburnham, did you not?

A. Yes, sir.

Q. What was the nature of his request to you, and what your response?

A. The nature of Mr. Torbet's request?

Q. Yes.
A. Mr. Dunbar sent him on as his legal attorney for a divorce.
Q. And what did he ask you?
A. He said Mr. Dunbar wished to get a divorce, and there was no use in my doing anything about it because he would have it, no matter what I done.
Q. You talked over the matter of divorce with him?
A. In Ashburnham?
Q. Yes.
A. Yes.
Q. And Mr. Torbet wanted you to let the divorce go through without your appearing and defending, did he not?
A. I think so. I hardly know what he did do then.
Q. Isn't that so? Wasn't that the proposition, that Mr. Dunbar wanted the divorce to go through without contest?
A. I think so.
Q. In Ashburnham?
A. Yes, sir.
Q. And that was what you went up to discuss with Bishop Niles?
A. Yes; and I went up with Mr. Torbet.
Q. That was your talk in Ashburnham, and you went up with Mr. Torbet to see Bishop Niles, to decide whether you should make such an agreement?
A. Yes, sir.
Q. Did you discuss with Mr. Torbet, in Ashburnham, as to what the ground should be upon which he would claim a divorce?
A. I think so; as I say, I don't hardly recall what I did do then. It was like a thunderbolt to me. I had no idea of any such thing.
Q. That is the first you had heard of it, and you were much distressed by it naturally?
A. Yes, sir.
Q. And was there anything said as to making provision for you, in case that occurred?
A. The question of alimony.
Q. What was the suggestion then made as to alimony?
A. That he would support the children and myself.
Q. And did he state how much he was ready to give?
A. No, sir; he did not.
Q. You had this general conversation with him and came to no determination,—no written agreement at Ashburnham?
A. No, sir.
Q. Then you proceeded to Concord?
A. Yes, sir.
Q. And you saw Bishop Niles?
A. Yes, sir.
Q. And did you tell him what Mr. Torbet had said?
A. Yes, sir.
Q. Did you consult with Bishop Niles before you talked with Mr. Torbet again?
A. I did.
Q. What did you ask Bishop Niles to do for you?

A. I merely told him my case, and wanted to know what I could do,—what I could do in such a case as that.

Q. You asked his advice as to what you could do?

A. Yes, sir.

Q. Could do with respect to what?

A. As to Mr. Dunbar's deserting me or wanting a divorce, because I knew of no reason.

Q. Did you tell Bishop Niles at the time whether you had actually deserted Mr. Dunbar?

A. No, sir; I did not. That was not my intention, any such thing as that.

Q. And you don't think now that you had deserted Mr. Dunbar?

A. No, sir.

Q. Did you say to Mr. Torbet whether or not you had deserted Mr. Dunbar?

41 A. I don't remember whether I did or not; as I say, I wasn't myself at all while Mr. Torbet was in Ashburnham. I was entirely broken down.

Q. Did you in Concord?

A. I did. I had no intention to desert Mr. Dunbar.

Q. Whether or not you told Mr. Torbet that?

A. No; I did not. I told Bishop Niles I had no intention to desert him, and I did not.

Q. What did you say to Bishop Niles about conferring with Mr. Torbet?

A. I asked him if he would let Mr. Torbet come there to see him, and I asked him if he would see Mr. Torbet and do the best he could for me, as I seemed to have hardly any one else to go to at that time.

Q. He should do the best he could for you?

A. Yes, sir.

Q. About what?

A. About the divorce or my trouble about Mr. Dunbar sending a lawyer from Cincinnati to get the divorce.

Q. Did you give him any further instructions?

A. No, sir.

Q. Did you tell him what he might or might not do with respect to you?

A. No, sir.

Q. Now, you are aware that after that a consultation was had between Mr. Torbet and Bishop Niles?

A. Yes, sir.

Q. And were you not present at one of those meetings?

A. No, sir; I don't think I was.

Q. Are you quite sure about that?

A. I don't think I was.

Q. How many meetings were there?

A. I don't think we went but once. I don't know that we did. I don't think we went there twice.

Q. You went to the house?

A. Yes, sir.

Q. And you went with Mr. Torbet?
A. No; I went by myself.
Q. Oh, and then Mr. Torbet came?
A. Yes, sir.
Q. Do you recall that you retired from the room where they were consulting?
A. Yes, sir.
Q. And do you recall whether you heard any of the conversation between them?
A. No; I didn't hear it; I was in another room.
Q. Now, when the consultation was over, Bishop Niles informed you as to what had occurred, did he not?
A. Yes sir.
Q. What did he tell you?
A. He said Mr. Torbet had come from Mr. Dunbar for a divorce, and I don't know what else he said, and he asked him if he wanted to marry again, and he assured him he did not. He said he did not; had no intention; he wanted to be free. He had no intention of marriage at all, and assured him he did not.
Q. Did he say anything to you about drawing up an agreement?
A. Mr. Torbet?
42 Q. Mr. Torbet; or of drawing up a memorandum later?
A. There were letters passed.
Q. Did Bishop Niles at that time show you a letter which they had drafted together?
A. Yes, sir; I think so.
Q. You think he did?
A. The letters were passed back and forth.
Q. Now, look that over, Mrs. Dunbar, and see if that refreshes your recollection as to what was then concluded (*handing witness a paper Exhibit* 4).
A. Mr. Williams, I can't see to read that very much. My eyes are very poor.

COUNSEL FOR DEFENDANT: If I may read it to the witness. (*Doing so.*) "Concord, N. H., 5/11/1889. Bishop W. W. Niles, Concord, New Hampshire. Reverend Sir:—" (I read this to you so that you may see whether you recognize it.) "After our lengthy conversation last evening relative to the affairs of Mr. and Mrs. H. B. Dunbar, I beg leave to make the following proposition on behalf of H. B. Dunbar, Esq., of Cincinnati, Ohio. In the event of an action for divorce being filed and the same being granted to H. B. Dunbar without a contest, he is to pay Mrs. Lottie E. Dunbar the sum of five hundred dollars yearly so long as she remains unmarried, and to the children of said marriage, Harry H. and Willie W., two hundred dollars each yearly until they arrive at the age of fourteen years; after the age of fourteen years they to receive such extra allowance yearly as will give them a good and sufficient education befitting their station in life, and a suitable maintenance until they reach the age of twenty-one. You are to advise the accepting of the within proposition and in no event are you to assist with advice or money

contest for divorce as before mentioned. If such be done or the divorce contested this letter is to be returned to the undersigned and be of no effect. Very truly yours, L. K. Torbet, attorney for H. B. Dunbar."

Now before you answer whether you recall that letter as it is, I want to warn you that certain words here are stricken out; that is, with a pencil: "In the event of an action for divorce being filed and the same being granted to H. B. Dunbar without a contest," now the pencil is drawn through that "without a contest." Do you remember seeing that stricken out?

A. I don't remember that, Mr. Williams; it was so long ago.

Q. Instead of two hundred there is written two hundred and fifty and the word "severally" is inserted; then in pencil is written in "a suitable maintenance until they reach the age of twenty-one years;" then the words are added in pencil: "If such be done or the divorce contested" this letter is to be returned to the undersigned and be of no effect." Now that letter was originally written in ink and these changes and erasures are made in pencil. Now do you remember having this called to your attention by Bishop Niles?

A. I do not.

Q. Do you remember a letter of that purport being read to
43 you as something which Bishop Niles had arranged with Mr. Torbet?

A. Yes, sir; I remember that letter.

Q. To that effect generally?

A. It seems so, but perhaps I can't remember all those little words written between, because it has been quite a long time.

Q. Now you understood, didn't you, that it was as I have read it; that was the arrangement substantially that was entered into at that time?

A. It seems to me so.

Q. Now it is true, isn't it, Mrs. Dunbar, that at that time, the drawing up of this letter, you understood that the drawing up of this letter was to make such arrangements as would be satisfactory to you for your support and the support of your children, so that you should not go to Cincinnati and contest the divorce proceedings?

A. I understood so; yes, sir.

COUNSEL FOR DEFENDANT: Now that is the first draft. If you would like to examine it. It will be used later as a draft submitted to Bishop Niles.

Q. I hold in my hand, Mrs. Dunbar, a power of attorney from H. B. Dunbar to L. K. Torbet of Cincinnati, Ohio, appointing him his true and lawful attorney for him, and in his name, place, and stead, to make settlement of all differences that now exist or may hereafter come up between me and my wife, Lottie E. Dunbar (*reading Exhibit* 3). Do you remember seeing that power of attorney?

A. Yes; I suppose I did.

Q. You must answer to the best of your knowledge.

A. To the best of my knowledge I think I did.

Q. Whether or not that is the exact phraseology and you think

that Mr. Torbet did show you same paper to show you his authority to act for Mr. Dunbar?

A. Yes, sir.

Q. Do you recall that when Bishop Niles displayed to you—I understand that he did display to you such a letter after the interview with Mr. Torbet?

A. Yes, sir.

Q. Do you recall whether or not there were some changes in the writing—some erasures?

A. No; I don't.

Q. And do you know whether Bishop Niles suggested to you at the time that he had insisted upon certain changes?

A. No; I don't.

Q. Now what did you understand was to be done with that letter? It was addressed to Bishop Niles?

A. Yes, sir.

Q. What did you understand was to be done with it?

A. I supposed these letters were to be returned to Mr. Torbet.

Q. Yes; and for what purpose?

A. In regard to legal proceedings in the divorce case.

Q. Did you understand that those were the terms of an agreement that Bishop Niles had succeeded in making with Mr. Torbet?

A. I understood so.

44 Q. And you understood that when that was read to you that that arrangement had already been made and was to be carried out by Mr. Torbet in behalf of Mr. Dunbar?

A. Yes, sir.

Q. Did you know that afterwards there were some—whether there were any other changes made after that?

A. By Bishop Niles, do you mean?

Q. Yes; by Bishop Niles.

A. I don't remember.

Q. How long were you in Concord at the time this letter was written?

A. We were there one afternoon, I think. I came Monday and I think either went back that night or the morning to Ashburnham.

Q. The following morning?

A. I think so; or that same night.

Q. You came in the afternoon and think you left the next morning?

A. I came some time during the day. I can't tell exactly the time.

Q. And you think you stayed over night?

A. I did not think I did. I thought I came back that night; perhaps it was the next day. I remember now, the morning.

Q. Would this make your memory certain (*reading*)? "After our lengthy conversation of last evening."

A. Yes, sir.

Q. That conversation was had in the evening with Bishop Niles, and then next morning this letter was shown to you?

A. Yes, sir.

Q. Did you stay at Bishop Niles', do you remember?

A. Yes, sir.

Q. When this letter was written to you, did you express your satisfaction or dissent?

A. I left it entirely with Bishop Niles. I thought whatever he said must be satisfactory.

Q. And you gave him authority then to do whatever he deemed to be wise under the circumstances?

A. I thought so.

Q. Do you recall that later on a new draft of that letter was sent to Bishop Niles by Mr. Torbet?

A. Well, I don't know.

Q. You don't know? Did you come into possession of a letter like that?

A. That one you have just read to me?

Q. Something like that.

A. The Bishop sent me letters.

Q. Your attorney now has the letters?

A. Yes sir.

Q. And you delivered them to him?

A. Yes, sir; the papers that Bishop Niles sent to me I delivered to him.

(*Counsel for defendant asked for the letter.*)

COUNSEL FOR PLAINTIFF: I have had no notice to produce any letters.

COUNSEL FOR DEFENDANT: No; but you have it before you, and I ask you to produce it that I may cross-examine on it.

(*It was produced.*)

45 Q. Now, whether or not you can identify that letter. Is your eyesight good enough?

A. It looks like Mr. Torbet's writing, as near as I can see.

Q. Does it look, if you can testify to it——

A. It does.

Q. —It looks like the one that was sent to you by Bishop Niles?

A. Yes.

Q. And that is, to the best of your judgment the one that you received and handed to your counsel?

A. Yes, sir.

COUNSEL FOR DEFENDANT: I would like to offer this, your honor.

(*Counsel for defendant read the letter* (*Exhibit* 8), *stating it was dated "Cincinnati, Ohio, May* 20," *or possibly "May* 28," *from Mr. Torbet to Bishop Niles, being similar to the other letter, including the alterations.*)

COUNSEL FOR DEFENDANT: This memorandum here appears to be in different writing.

Mr. TORBET: That is Bishop Niles'.

Q. Can you see enough to say whose handwriting that is, Mrs. Dunbar?

A. I should think it was Bishop Niles'.

Q. (*Reading memorandum on the back.*) "Agreement with me of attorney of H. P. Dunbar, being the consideration upon which Mrs. Dunbar's formal contract after the divorce was based, that the person to whom this is addressed do not assist in the contesting of the suit." Do you know whether that was on when you got it from Bishop Niles?

A. I should think it was.

Q. You think it was?

A. I understand so.

Q. And you read that and that was true, was it not?

A. Yes, sir.

Q. Now, did you continue to live in Ashburnham after that?

A. Yes, sir.

Q. Did you have any further consultation with Bishop Niles in regard to the matter?

A. Yes, sir; I think I did. I wrote to him and he answered me from Paris, while he was abroad.

Q. Well, did you see him again about that matter? Did you see him again that summer?

A. No, sir; I don't think I did.

Q. That is to say, after Bishop Niles had read you what he had arranged, you went home and left the matter to Bishop Niles.

A. Yes, sir.

Q. Now, shortly after that you received from Mr. Torbet a notice of the divorce proceedings?

A. From Bishop Niles; it was sent to Bishop Niles and he sent it to me, I think.

Q. Are you quite sure of that?

A. I thought so; I am not quite sure of that.

Q. Didn't it come direct from Mr. Torbet to Ashburnham?

A. I don't know.

Q. It was a newspaper advertisement?

A. Well, perhaps it was; I didn't remember.

46 Q. Well, you did receive such, that he had filed a petition for divorce?

A. For divorce?

Q. From you; in which you were the party that he proceeded against, and claiming that you had deserted him?

A. No; I didn't claim any such thing; there was no desertion.

Q. No, you don't understand my question; this notice showed you, did it not, that he had brought a suit against you for desertion and asking to be divorced from you on account of desertion?

A. Yes, sir.

Q. Let me ask you if this refreshes your recollection. See if you recall this (*showing to witness*). This was the form of the notice: "Court of common pleas, Hamilton county, Ohio. 84290. H. B. Dunbar *v.* Lottie E. Dunbar. The above-named defendant, whose last-known place of residence was Ashburnham, Mass., etc. Praying for a divorce on the grounds of wilful absence of the defendant for three years last past." June 24, 1889, the first notice. Does that sound like the notice you received?

A. I think it does.
Q. Pardon me.
A. I think so.
Q. You didn't appear or file any answer in the case, did you?
A. I left it with Bishop Niles.
Q. Well, you did not appear to contest the divorce?
A. No, sir.
Q. And you understood at that time that it was not to be contested?
A. Yes, sir.

COUNSEL FOR PLAINTIFF: What was said, I suppose.
The COURT: I should prefer what was said.

Q. You didn't intend to contest the suit?
A. I had no way of doing so, and I left it with Bishop Niles to do what he thought was right.
Q. But you understood at that time that he had agreed not to contest in your behalf?
A. Yes, sir.

The COURT: I excluded that question in another form. I don't propose to let it in in the form you have put it.
COUNSEL FOR DEFENDANT: Very well, your honor.

Q. Did you know when the divorce was granted?
A. No, sir; I did not know the date. I did not know anything about it until Mr. Torbet came to Ashburnham.
Q. Your counsel suggests that you may not understand the question. Did you know when the divorce was granted to Mr. Dunbar?
A. Oh, yes; I did.
Q. Through whom did you know it?
A. Bishop Niles, I suppose.

COUNSEL FOR DEFENDANT: Now I have here, if I may use this, Mr. Stewart, what you probably remember as the green document.
(*Exhibit* 1.)
47 The WITNESS: Yes, sir.
Q. That you have examined while your eyesight will permit you?
A. Yes, sir.
Q. You recall that document?
A. Yes, sir.
Q. And you received that agreement?
A. Yes, sir.
Q. From whom?
A. From Bishop Niles; it was sent to him and from him to me.
Q. And he told you that he had received it, did he?
A. Yes, sir.
Q. And that was a paper signed by Horace B. Dunbar, was it not?
A. Yes, sir.

Q. Do you remember when it was received?
A. I don't quite remember the date.

COUNSEL FOR DEFENDANT: I would like to read this agreement, your honor. "Know all men by these presents: (This is the agreement, I may say, that was the first of the two agreements.) That I, Horace B. Dunbar, of Cincinnati, Ohio, do by these presents bind myself to pay unto Lottie E. Dunbar of Ashburnham, Massachusetts, the sum of five hundred dollars yearly so long as she remains unmarried, same amount to be paid in monthly instalments of forty-one dollars, payable between the first and tenth days of each month, and to our children Harry and Willie, the sum of two hundred and fifty dollars each yearly until they have each attained the age of fourteen years; after that age they are to be paid by me such extra allowance as will give to them a good and sufficient education befitting their station in life and a suitable maintenance until they each attain the age of twenty-one years; such sums of money are to be paid them in equal monthly instalments between the first and tenth days of each month. Horace B. Dunbar. Witness:—Cunningham; L. K. Torbet." And the jurat (*reading*) L. K. Torbet; and impress of the seal; and on the back is written, "Contract H. B. Dunbar to Lottie E. Dunbar," and below is the stamp of Mr. Torbet and his office.

Q. You notice the date, the 4th of September, 1889. Now when you received this were you informed that the divorce had been granted?
A. Yes, sir.
Q. And Bishop Niles sent this to you by letter?
A. Yes, sir; that document as it is.
Q. It was inclosed to you in a letter, was it?
A. Yes, sir.
Q. Do you remember whether or not he wrote you at the same time? Was there a letter of explanation?
A. I do not remember, but it seems to me there was.
Q. You think there was?
A. I think so, but I am not sure.
Q. Were you informed at that time by Bishop Niles, if you recall, whether or not he had been in correspondence with Mr. Torbet about the drafting of this contract?
A. I think he had.
Q. And you received it from Bishop Niles, and after that you received from month to month payments in accordance with this?
A. Yes, sir.
Q. And received those payments up to what date? Do you recall now?
48 A. I had payments, it will be two years this coming May, two years next month, since I received them.
Q. That would be May, '98?
A. Yes, sir.
Q. Now, in May, '98, you received no payment?
A. I received payment in May.

Q. So the first payment which was defaulted was in June? That is you recollection?

A. Yes, sir.

Q. Was any explanation given you then why the payment was not made?

A. No, sir; unless you call Mrs. Dunbar's visit here, saying that there was no need of their paying anything and never had been.

Q. The new Mrs. Dunbar?

A. Yes, sir.

Q. He had married again in the meantime?

A. Yes, sir.

Q. Did you receive any word from Mr. Dunbar, saying why he had not paid?

A. No, sir.

Q. And nothing more was paid on it during that year or the next year?

A. No, sir.

Q. Recall, Mrs. Dunbar, that I am now referring to the green contract.

A. I did not understand you.

Q. Now, that green contract was dated 1889. Now, how long did you receive payments on the green contract without default?

A. It was two or three years, something like that, and then I went to Mr. Stewart.

Q. Now, how long had Mr. Dunbar been in default in these payments before you went to Mr. Stewart?

A. Some months.

Q. Can you tell how many, about?

A. Well, I think during the summer—I think I went to him in the fall.

Q. During the summer there had been no payments?

A. I think not.

Q. Did you receive any information from Mr. Dunbar or any one in his behalf at that time why the payments were not made?

A. Mrs. Dunbar came.

Q. Oh, that was when she came?

A. Yes; that was the first time I met her. I met her at Young's hotel. That was the first time I met her, I think, and she took me down to a lawyer's office on Devonshire street.

Q. Did you go to the lawyer's?

A. Yes, sir.

Q. What was his name?

A. Something that began with W. Mr. Torbet might remember who it was.

Q. Was Mr. Torbet there?

A. No, sir.

Q. How long after you saw her was it that you did not get anything on this agreement?

A. Quite a little while; some months.

Q. And then not receiving anything you went to Mr. Stewart?

A. Yes, sir.

49 Q. You took this green contract to him?
A. Yes, sir.
Q. And then took his advice as your attorney?
A. Yes, sir.
Q. Now, under his advice a second agreement (*Exhibit* 2) was drawn, was it not?
A. Yes, sir.

COUNSEL FOR DEFENDANT: And that second agreement; may I look at that? (*It was produced.*)

Q. The second agreement has been shown you already, has it not?
A. Yes, sir.
Q. It was drawn up by Mr. Stewart and then signed by you and then sent out to Ohio?
A. Yes, sir.
Q. Now at that time did you have any consultation with Mr. Dunbar?
A. No, sir.
Q. And what had occurred between you and him between the drawing or delivery to you of this green contract and the signing by you of the second contract?
A. Between Mr. Dunbar and myself?
Q. Yes.
A. Nothing; it was between Mr. Stewart and Mr. Dunbar. I had no communication with Mr. Dunbar.
Q. There had been no change so far as you know in your relations from the time of the drawing of the green contract to the time of the drawing of the second contract?
A. Not that I know of.

COUNSEL FOR DEFENDANT: We may consider that second agreement in, Mr. Stewart?
COUNSEL FOR PLAINTIFF: Yes.

Q. Now, after that, you received money again under that agreement?
A. Yes, sir.
Q. What was the first payment made under the second contract or agreement?
A. I got an increase in my monthly payments.
Q. And those payments were made for a time were they not?
A. Yes, sir.
Q. And when did they cease?
A. It will be two years next May.
Q. That is the time you have testified to before; that is, you didn't get your June payment?
A. No, sir.
Q. And since then you have received nothing?
A. No, sir.
Q. Do you recall receiving notice of the bankruptcy of Mr. Dunbar?
A. Through Mr. Stewart; yes, sir.

Q. You signed a proof of claim?
A. Yes, sir.
Q. Against his estate in bankruptcy?
A. Yes, sir.
Q. Mr. Stewart prepared that for you, I suppose?
A. Yes, sir.
Q. And you signed that at his suggestion?
A. Yes, sir.
50 Q. In this contract, Mrs. Dunbar, is this phrase: "Controversies having arisen, etc." What controversies had there been about that first agreement?
A. Between Mr. Stewart and Mr. Dunbar.
Q. What controversies had there been; did you know of any over that agreement?
A. I suppose about the stopping of the payments and the additional increase.
Q. That is all you know about?
A. Yes sir.

Redirect examination of LOTTIE E. DUNBAR:

Q. Is there anything about this paper that Mr. Williams questioned you about that you recognize as having seen before?
A. Yes, sir.

The COURT: The rough draft?
COUNSEL FOR PLAINTIFF: Yes, sir.

Q. Can you see it to read?
A. No, sir; from the writing it looks like Mr. Torbet's, but I can't read the letter. I read the signature with my glasses.
Q. Is there anything except the general tenor that seems familiar to you?
A. It seems to me the whole.
Q. With the interlineations or without them, or don't you know?
A. No, sir; it seems to me the whole of it.
Q. The words "without any contest" are erased; do you know anything about that?
A. No, sir; I think it was right.
Q. Have you any memory about the words "without any contest," as the subject of discussion?
A. Yes; I remember.
Q. And now, do you remember that the words "without any contest" were stricken out of the draft?
A. Yes, sir.
Q. You heard the letter, the final letter, that was sent, dated the 20th, read here?
A. Yes, sir.
Q. And you understood that that did not contain the words "without any contest"?
A. Yes.
Q. When you received the green agreement, as you call it, do

you remember whether there was any letter accompanying it from Mr. Torbet,—from Mr. Torbet to Bishop Niles?

A. There was a letter accompanying it from Mr. Torbet to Bishop Niles. (*The letter was shown to counsel for defendant.*)

Q. I don't suppose you can see that well enough to tell?

A. No, sir; it looks like it.

(*Counsel for plaintiff then read the letter* (*Exhibit* 9) *from Mr. Torbet to Bishop Niles, commencing "Enclosed you will find binding agreement," etc.*)

51 Q. I understood you to say to Mr. Williams that Mr. Torbet first suggested going to Bishop Niles?

A. Yes, sir.

Q. And you referred to him as a mutual friend?

A. Yes, sir.

Q. A mutual friend of whom?

A. Myself and my children.

Q. How long had he known your husband?

A. Ever since we were married; ten or twelve years.

Q. When did Mr. Stewart first come into the matter?

A. In the fall——

Q. After these payments were stopped on the first contract?

A. Yes, sir.

Q. And after that I suppose you left everything in his hands?

A. Yes, sir.

Q. You said that you went to a lawyer with Mr. Dunbar's second wife.

A. Yes, sir.

Q. Was it Mr. Brandeis?

A. Yes, sir.

Q. At whose suggestion did you go to see those lawyers?

A. Mrs. Dunbar's.

Q. Were they acting for you in any way?

A. No, sir.

Q. Now let me call your attention to that second agreement again.

The COURT: The agreement of '96?

COUNSEL FOR PLAINTIFF: Yes, your honor.

Q. This second agreement (*Exhibit* 2), the last one, I understand you to say was brought about by Mr. Stewart?

A. Yes, sir.

Q. Have you any such memory as will allow you to state whether that was executed in duplicate or only one?

A. Two, I think.

Q. Have you any such recollection that you can state whether or not, when you put your name on it, Mr. Dunbar's name was upon it?

A. Yes, sir.

Q. You think it was?

A. Yes, sir.

Q. Did you give Bishop Niles any instructions?
A. No, sir; I told him to do the best he could.
Q. You told him to do the best he could?
A. Yes, sir.
Q. Were you possessed then of any means, any property?
A. No, sir.
Q. Whether or not during all these negotiations, or during negotiations with Mr. Dunbar's brother and Bishop Niles and Mr. Torbet, you were represented by any lawyer?
A. By Mr. Stewart.
Q. I am going back to the Concord interview, and Ashburnham.
A. Oh, no; I had no lawyer.
Q. You had no lawyer?
A. No, sir.

52 Recross-examination of LOTTIE E. DUNBAR:

Q. You testified this morning with respect to that contract (Exhibit 2) that it was signed by you and then sent out to Mr. Dunbar to be signed and then sent back to you, didn't you?
A. Mr. Dunbar signed it and sent it to me to sign.
Q. You testified this morning that it was at Mr. Stewart's office that you signed it and that it was sent out to Mr. Dunbar to be signed by him. That is what you testified, wasn't it?
A. I thought it was signed by him and then I was to sign it.
Q. One moment. Let me ask you to answer that question. You testified before the recess that that contract was drawn by Mr. Stewart, and he presented it to you and you signed it, and then it was sent out to Mr. Dunbar for his signature; that is what you testified, did you not? Don't you remember?
A. Mr. Dunbar signed it and then I signed it afterwards; that is what I understood.
Q. I am asking you whether you so testified this morning. You can remember, can't you?
A. I meant to testify right.
Q. You did so testify this morning, did you not?
A. If you say I did, I suppose I did.
Q. That isn't the question. Isn't it a fact that you did so testify?
A. I suppose I did, but I meant to say the other.
Q. You did so testify, didn't you? That you haven't any doubt about. Isn't that so?
A. Yes, sir.
Q. You did. Now, during the intermission did your counsel talk with you about that?
A. No, sir.
Q. Didn't? You have changed your mind since then.
A. I have not changed my mind, because I thought I told it just as it was, as I remembered it when I had my eyesight, and could see.
Q. What made you change it?
A. I didn't think I testified so.
Q. Now, Mrs. Dunbar, didn't Mr. Stewart say something to you this noon about your testimony?

A. No, sir.
Q. Or any one,—or Mr. Teele, or Bishop Niles?
A. No, sir.
Q. Now, what caused you to change it?
A. I didn't think I did; I thought I told it as it was.
Q. What suggested to you?
A. Nothing at all.
Q. Were you right or wrong this morning?
A. I thought Mr. Dunbar signed it first and I signed it afterwards.
Q. You are not very positive, are you?
A. I think so.
53 Q. Do you recall now whether or not, on that agreement, was Mr. Dunbar's name?
A. I think it was.
Q. Written?
A. Yes, sir.
Q. And witnessed?
A. Yes, sir; and then I signed it.
Q. You signed it in Mr. Stewart's office, didn't you?
A. Yes, sir.
Q. Do you remember testifying in the court below?
A. Yes, sir.
Q. Do you remember testifying there that Mr. Stewart drew it up and you signed it and then it was sent out to Mr. Dunbar for his signature?
A. I thought Mr. Dunbar's signature was on it.
Q. No, no; do you remember testifying in the lower court before the other judge that it was drawn up by Mr. Stewart, signed by you and then sent to Mr. Dunbar for signature? Didn't you so testify there?
A. I suppose I did.
Q. Don't you remember that you did?
A. Yes; I think I must have.
Q. What has occurred since then to change your mind on that question?
A. Nothing.
Q. What has made you remember now better than you could remember then?
A. Nothing.
Q. After you had testified in the court below to that effect, did you remember that you had testified wrong?
A. No, sir.
Q. And after you testified this noon, did it occur that you had not answered right?
A. No, sir.
Q. Just come to you now?
A. It was just as I thought it was. The papers were brought to me down in the lower court, and as I could see the signature at the bottom with my glasses then, I thought that was the way it was.

(*Counsel offered in evidence a case in* 13 *Ohio St. Rep. p.* 228.)

L. K. TORBET, on behalf of the defendant, testified as follows:

Q. What is your name?
A. L. K. Torbet.
Q. What is your business?
A. Attorney-at-law.
Q. Where do you live?
A. Chicago.
Q. You now reside in Chicago?
A. Yes, sir.
Q. You are not practising now, are you?
A. No, sir.
Q. When did you discontinue the practice of law?
A. 1890.
Q. For what reason?
A. For my health.
Q. Previous to that time you had been a practising attorney in Cincinnati?
A. Yes, sir.
Q. Were counsel for Horace B. Dunbar?
A. Yes, sir.
54 Q. Knew him personally?
A. Very well.
Q. And in 1889 you represented him in matters connected with his divorce?
A. I did.
Q. You appeared in the divorce proceedings?
A. I did.

COUNSEL FOR THE DEFENDANT: Now I have relied upon you, Mr. Stewart, for that divorce record.

(*The record was produced and put in evidence.*)

Q. You came on to the East, Mr. Torbet, in behalf of Mr. Dunbar?
A. Yes, sir.
Q. Was Mrs. Dunbar, as she has testified, in Ashburnham?
A. Yes, sir.
Q. What conversation did you have with her there?
A. Coming to Boston, I met the brother of Mr. Dunbar, and from Boston we went to Ashburnham to meet Mrs. Dunbar. I made known my calling; Mr. Dunbar, Mrs. Dunbar and myself adjourned to a grove near by and the matter was taken up. It was discussed at length as between us three; I told them what I came for. At that time she asked, as I remember, by what authority, and I showed my authority.
Q. Is this Exhibit 3 the power of attorney you displayed?
A. Yes, I recognize that as the power of attorney that was given me by Horace Dunbar at that time, and after considerable discussion about the matters in which things of vital interest were taken up as between her and him, I suggested if she was not well acquainted with Bishop Niles; she said she was; I said, "Before we

go any further in this matter, I suggest that you go to Concord, N. H., and confer with Bishop Niles in this matter, and take his advice; take what advice he may give you," and she did. Mr. Dunbar returned to Boston and I went to Concord.

Q. Did you go with Mrs. Dunbar?

A. I don't remember; I am under the impression, however, that I did.

Q. Now what was the talk you had with Mrs. Dunbar at Ashburnham?

A. Well, we went over the matter. I told Mrs. Dunbar the condition as to how Mr. Dunbar felt in regard to the matter; that they had not been living together for five years, which she admitted, and that he thought it wise that suitable provision should be made for her in this matter, and that a divorce should be granted. She talked the matter over, and, of course, was very much wrought up, as I readily saw. I said to her, "Just wait a minute before you make an answer about this and study it over." After some, probably ten or fifteen minutes elapsed before she spoke, during which time we waited; she said of course she regretted this exceedingly, but no doubt that was the case, and such being the case she would consult with Bishop Niles, as I had suggested, and decide about the matter.

Q. What was said about divorce proceedings?

A. I told her that we would certainly bring an action in any event; Mr. Dunbar, his feelings was such in regard to living
55 with her that it seemed impossible for him to do so, and she said certainly it seemed to be that way as they had not been living together for five years. Of course she recalled the fact of her marriage, and the birth of her two boys, and generally went over the matter as Mr. Dunbar did with me.

Q. And when did you get to Concord?

A. I got there in the middle of the afternoon. Mrs. Dunbar had got up there, and I sent up my card and asked Bishop Niles if I could see him,—from the hotel,—and he sent word that I could, so I went up there and we had considerable conversation about the matter.

Q. Where did you see Mrs. Dunbar?

A. At Bishop Niles' home.

Q. Whether when you first called there, she was there?

A. She was there in the room for a short time, and then she left the room, and then Bishop Niles and I went over the matter in detail practically the same as I had gone over it with Mrs. Dunbar, and he told me that Mrs. Dunbar had conferred with him in the matter. I then returned to the hotel and drafted a letter which I had there marked "Number 1" (Exhibit 4). I recognize this as the first letter that I wrote to Mr. Dunbar from the Phœnix hotel in Concord, N. H. I took this letter to Mr. Niles and read it over to him——

Q. Just a moment; whether or not, before this, you had conferred with Bishop Niles upon the substance of that agreement?

A. Yes, sir.

Q. And whether you had agreed together that that would be satisfactory?

(*This was objected to.*)

Q. Or whether or not this was the incorporation of substantially what you understood to be your agreement?

A. Yes, sir; I think it is.

COUNSEL FOR THE PLAINTIFF: If this agreement was reduced to writing, these letters or writings speak for themselves.

The COURT: Certainly they do.

Q. Now, about the changes that were made?

A. The interlineations are in my handwriting made at the suggestion of Bishop Niles, and the erasures the same, as you will notice here, what we had agreed, was $400, and at his suggestion we made it $500.

Q. Now had the substance of this agreement, or the subject of this agreement been discussed with Mrs. Dunbar?

A. Yes, sir; we talked with Mrs. Dunbar about it; she was called into the room and she acquiesced.

Q. Was that when you made this agreement?

A. I am under the impression it was; I won't say absolutely.

Q. Now, you have a letter here marked "2" (Exhibit 5).

A. Yes, sir; this letter marked "2," after returning to my hotel at night, I made changes in accordance with that, and marked that "Number 2," and took it up to him in the morning, and some
56 other erasures were made at that time, and I took that back with me to Boston, and then wrote another letter.

Q. This one was prepared after your first conversation, and you went to the hotel and prepared this, and took it back in the evening?

A. Yes, sir; after the dinner hour.

Q. Then the next morning you made a new draft?

A. Yes, sir; I happened to have some paper in my hotel, and took that back at that time; and then that letter, upon the basis of that, I drew another one, so that there would not be any erasures or interlineations.

Q. Now you made a third draft (Exhibit 6)?

A. Yes, sir.

Q. What is that? (*Showing witness.*)

A. This is the original letter (Exhibit 6) that I sent to Bishop Niles from Boston on the eleventh day of May, and which he then returned; I sent it by registered letter. I recognize this letter as being the one that he returned to me in Cincinnati, and with some other writing different to what I had put in.

Q. What is that?

A. This, "and the children to remain in their mother's custody," is in his handwriting there; and upon the basis of that letter, when it was returned to me, I drafted and sent him the letter, which is now in evidence, dated May 20, which has been submitted to the court.

Q. So you made four drafts in all?
A. Yes, sir.
Q. And the final draft is the one which has been——
A. Offered in evidence; yes, sir.
Q. Now, this is dated the eleventh?
A. The eleventh and the twentieth also,—Cincinnati. I made that final change to show that was an exact copy of the letter written in Boston, that I sent from Cincinnati after he had returned it to me with the changes made then.
Q. Did you write him a letter, do you remember?
A. No more than that letter.
Q. Just enclosed that to him?
A. Just enclosed that to him, and then he replied to me at the same time. As I remember, all the letters were turned over to Mr. Horace B. Dunbar on the ninth of October.
Q. After the divorce proceedings, what did you have to do with drafting this green contract? (*Showing to witness Exhibit* 1.)
A. I drafted that contract and had it certified to by Mr. Dunbar and had it sent to Bishop Niles. There may have been some letters passed between us, but I don't remember what they were. As I say, both letters, press copies, and the letters in reply, I turned over to Mr. Dunbar.
Q. And this was the only draft signed by Mr. Dunbar?
A. Yes, sir.
Q. And forwarded to Bishop Niles?
A. Yes, sir; as I now recall.
Q. That was in September, 1889?
A. It was.
57 Q. Did you have anything more to do with the case after that?
A. Nothing more.

COUNSEL FOR THE DEFENDANT: The letter that accompanied this contract, September, is there one? (*The letter was produced.*)
COUNSEL FOR THE DEFENDANT: September 4, here is a letter (*Exhibit* 9) signed by you (*reading*) "Enclosed you will find binding agreement signed by Horace B. Dunbar, Esq.," etc.
A. Yes, sir.
Q. That letter was sent with this?
A. Yes, sir.
Q. Now that letter of May 20 (*Exhibit* 8), which letter was that?
A. That was the letter that was in evidence, number four, it would be marked "Number 4," the final letter there.

Cross-examination of L. K. TORBET:

Q. There were three letters, three drafts that you made, one after the other?
A. Yes, sir.
Q. And the whole matter was finally embodied in the letter of May 20?
A. Yes, sir.

Q. And that was the letter that was sent?
A. Yes, sir.
Q. And the only one that was used?
A. Yes, sir.
Q. They all commenced with the same language, I believe,—"After our lengthy conversation"?
A. Yes, sir; practically the same.
Q. In that first draft, on the first page, the words "without contest" are erased. Who erased those?
A. I presume I did.
Q. At the request of Bishop Niles?
A. At his suggestion.
Q. Also an erasure here,—"Then you are to advise the accepting of the within proposition, and in no event are you to assist, with advice or money, the contest for divorce as before mentioned," and the "before mentioned" is stricken out.
A. Yes, sir.
Q. Is that your erasure?
A. I presume it is.
Q. Now, draft number two, dated the 11th of May, commenced the same way?
A. Yes, sir.
Q. The sentence reads, "You are to advise the accepting of the above proposition, and in no event are to assist by advice or money the contest for divorce, if such be taken, or the divorce be contested."
A. Yes, sir; I struck that out.
Q. That erasure, "or divorce contested," was stricken out?
A. Yes, sir.
Q. By you?
A. Yes, sir; and that was at his suggestion, of course; we tried to get our minds together.
Q. It was at his suggestion that all these erasures were made and you made them?
A. Yes, sir; made them together.
58 Q. And in the third draft, the sentence is, "You are to advise accepting of the above proposition, and in no event are you to assist by advice or by money the contest for divorce."
Q. Yes, sir.
Q. And with interlineations there?
A. Yes, sir; Bishop Niles did that, it is his handwriting.
Q. You undertook or understood, did you not, between you and him, that the custody of the children was to be a matter of decree?
A. Certainly.
Q. And wasn't it understood that the arrangement for the wife's and children's support was to be a part of the decree?
A. No, sir.
Q. Did you understand that the arrangement that you made about the alimony was a reasonable and proper one for Mr. Dunbar to make at that time?

A. I did at that time for the maintenance of the children and herself, not as alimony.

Q. The amount of it you considered reasonable for a man in his circumstances at that time?

A. Yes, sir.

Q. You had a power of attorney from him?

A. I did.

Q. Did you consider that any more than a letter of introduction or a matter of endorsement to identify you?

A. That is a question perhaps—as much as anything else.

Q. A letter of introduction would have answerd your purpose just as well?

A. Well, I don't know as it would.

Q. You have examined that (*showing paper to witness*)?

A. I have not fully. Let me look at that letter number three.

Q. You notice that is dated three days before the final one?

A. Yes, sir; but he says here, "Replying to your letter of the eleventh," which is this note. I presume there is no doubt but I received a letter similar to that; I won't say it is an exact copy, but similar to that. The letter which I received was turned over to Mr. Dunbar.

COUNSEL FOR THE PLAINTIFF: I offer it as a part of the correspondence which was closed by the letter of the twentieth. (*The letter of May 17, 1889, to L. K. Torbet was read, Exhibit* 7.)

WITNESS: That was in reply to my third draft that he returned to me.

COUNSEL FOR THE PLAINTIFF: I was in error in stating that that letter of the twentieth was written in reply to that letter of the seventeenth.

COUNSEL FOR THE DEFENDANT: That letter of the twentieth was written after the receipt of that letter of the seventeenth from Bishop Niles?

WITNESS: Certainly.

Q. You were, at the time these proceedings were going on in 1889, in practice?

A. I was.

59 Q. In Cincinnati?

A. I was.

Q. And had been in practice there then how many years?

A. In Cincinnati about eight years.

Q. You undoubtedly understood the laws of Ohio very well, concerning divorce?

A. I thought I did.

Q. And when you were on here negotiating with Mrs. Dunbar first, and then with Mr. and Mrs. Dunbar and Bishop Niles, she had no counsel, had she?

A. Not that I know of; at least none that I came in contact with.

Q. You acted then as a member of the Ohio bar?

A. I was.

Q. Throughout this arrangement in Massachusetts and New Hampshire you acted in good faith?

A. I certainly did, considering the circumstances.

Q. And according to your understanding of your duty and honor as a lawyer?

A. I certainly did and so stated to Bishop Niles, as he stated in his letter there as a matter of love.

Redirect examination of L. K. TORBET:

Q. Did you receive any acknowledgment from Bishop Niles of the receipt of your letter of the twentieth?

A. I don't know, unless there may be some copies that I don't call to mind. They claim to have obtained them from counsel that succeeded me.

COUNSEL FOR THE DEFENDANT: Have you no copy of your letter written on or about May 20 in answer to that?

COUNSEL FOR THE PLAINTIFF: No.

(*Defendant rested.*)

Reply of Plaintiff.

FRANK H. STEWART, being duly sworn on behalf of the plaintiff, testified as follows:

Q. What is your name?

A. Frank H. Stewart.

Q. Mr. Stewart, you are counsel for Mrs. Dunbar?

A. Yes sir.

Q. When did you first come into the matter?

A. Some time in 1896; I do not remember just when.

Q. Whether or not she brought to you this agreement?

A. She did.

Q. The first of the two agreements since the divorce. What did you do? With whom did you engage in negotiations or correspondence?

A. I corresponded directly at first with Mr. Dunbar.

Q. Did he refer you to anybody?

A. Wilby & Wald, attorneys in Cincinnati, with whom I had correspondence; chiefly with Mr. Wald.

60 Q. How long were those negotiations going on before you got this final agreement?

A. Several months.

Q. I notice the phrase used in that agreement, "consideration of the forbearance to sue." Whether or not you had in your negotiations or in your letter to Mr. Dunbar or his attorneys proposed to bring suits for the enforcement of that agreement?

A. We had, certainly.

(*This was objected to by counsel for defendant.*) If there is any such evidence, let's have it.

COUNSEL FOR PLAINTIFF: I can put in the batch of letters, but that is the only question I intended to ask.

Q. And this second agreement (Exhibit 2) was brought about by you?

A. Brought about by me.

Q. Have you any remembrance which of them, Mr. or Mrs. Dunbar, signed that agreement first?

A. I can't remember; I have been trying to remember since the recess.

Cross-examination of FRANK H. STEWART:

Q. Have you the letter, Mr. Stewart, with which that agreement was transmitted?

A. No, sir; I have been hunting for it and can't find it.

Q. You have regular files?

A. Yes, sir; regular files.

Q. And you copy all the letters you send out?

A. Yes.

Q. Don't you think you can find that letter?

A. I did not have time during recess. I was looking up the matter of contract. I may say in regard to what Mrs. Dunbar said that I have absolutely no remembrance in the matter, and I don't know why she should.

FRANK H. STEWART, being recalled by counsel for defendant, testified as follows:—

COUNSEL FOR DEFENDANT: Have you examined your letter-press book?

A. I have.

Q. And your files of letters?

A. I have.

Q. What do you ascertain in respect to the point?

A. As to whether or not the instrument (Exhibit 2) was signed here first?

Q. Yes.

A. It was signed here first.

Q. And you have correspondence showing that?

A. Yes, sir; I have.

Q. Showing that it was signed here by your client and then sent on to Cincinnati?

A. It was first signed here.

Q. Whether or not you received the contract back in due course of mail?

A. Yes, sir.

Q. With Mr. Dunbar's signature?

A. Yes, sir.

61 Counsel for plaintiff offered and put in evidence the following:—

19 Ohio State, 502, Cox *v.* Cox.
44 Ohio State, 449.
52 Ohio State, 229.
45 Ohio State, 452.

Wright (Ohio), 514.
11 Law Bulletin (Ohio), 191.
15 Wallace, 549.
Ohio Statutes, Benedict, vol. 1, sect. 3112, sect. 5703.
Wright (Ohio), 643.
Wright (Ohio), 243.
Wright (Ohio), 632.

Counsel for defendant offered and put in evidence the following cases:—

Judy *v.* Louderman, 48 Ohio State, 562.
Stoutenberg *v.* Lyband, 13 Ohio State, 228.
Sayles *v.* Sayles, 1 Foster (21 N. H.), 312.

No question of pleading or of the validity of the decree of divorce was raised.

EXHIBIT 1.

Know all men by these presents: That I, Horace B. Dunbar, of Cincinnati, Ohio, do by these presents bind myself to pay unto Lottie E. Dunbar, of Ashburnham, Mass., the sum of "five hundred dollars" yearly, so long as she remains unmarried, the said amount to be paid in monthly installments of "forty-one and 66–100 dollars" payable between the first and tenth days of each and every month. And to our children Harry H. Dunbar and Willie W. Dunbar the sum of "two hundred and fifty dollars" each, yearly, until they each attain the age of fourteen years, after that age they are to be paid by me such extra allowance as will give to them a good and sufficient education befitting their station in life and a suitable maintenance until each attain the age of twenty-one years. Such sums of money are to be paid them in equal monthly installments between the first and tenth days of each and every month.

(Signed) HORACE B. DUNBAR.

Witness-:
(Signed) W. C. CUNNINGHAM.
L. K. TORBET.

62 STATE OF OHIO, *Hamilton County,* } *ss:*

Be it remembered that on the fourth day of September, A. D. 1889, before me personally came Horace B. Dunbar, of Cincinnati, Ohio, the constituent in the foregoing contract, and acknowledged the signing thereof to be his voluntary act, for the uses and purposes therein mentioned.

In testimony whereof I have hereunto subscribed my name and affixed my notarial seal on the day and year last above mentioned.

[Notarial Seal, Hamilton County, O.]

(Signed) L. K. TORBET,
Notary Public, Hamilton Co., O.

EXHIBIT 2.

Controversies having arisen concerning the agreement heretofore made between Horace B. Dunbar and Lottie E. Dunbar in September 1889: In consideration of said Lottie E. Dunbar's *of* forbearing suit on such controversies, and in settlement of all such controversies, and in substitution of said agreement of September 1889, and in further consideration of the release by Lottie E. Dunbar, and in satisfaction of all claims under said original agreement, Horace B. Dunbar agrees with the said Lottie E. Dunbar as follows:

That Horace B. Dunbar will pay to Lottie E. Dunbar during her life, or until she marries, for her maintenance and support, yearly, the sum of five hundred dollars, and will pay to her yearly for the support and maintenance of her child Harry H. Dunbar the sum of four hundred dollars until he shall attain the age of twenty-one years; and shall pay to her yearly for the support and maintenance of her child Willie W. Dunbar the sum of four hundred dollars until he shall attain the age of twenty-one years, all said sums to be paid in equal monthly installments between the first and tenth of each and every month—the first installment being for the month of May 1896, shall be paid between the first and tenth of June 1896.

And in addition to the foregoing said Horace B. Dunbar agrees to pay the further sum of one hundred dollars between the first and tenth day of July 1896, over and above the installment otherwise due for said month.

And the said Lottie E. Dunbar hereby agrees that she has not, nor shall she have any other claim or demand against Horace B. Dunbar for contribution to her support and maintenance or
63 for the support, maintenance or education of said children save and except as fixed and limited by this agreement.

(Signed) HORACE B. DUNBAR. [SEAL.]
LOTTIE E. DUNBAR. [SEAL.]

Witness-:
(Signed) GUSTAVUS H. WALD.
FRANK H. STEWART,
To L. E. D.

EXHIBIT 3.

Know all men by these presents: That I, H. B. Dunbar of Cincinnati, Ohio, have made, constituted, and appointed, and by these presents do make, constitute and appoint L. K. Torbet of Cincinnati, Ohio, true and lawful attorney, for me and in my name, place and stead, to make settlement of all differences that now exists or may hereafter come up between my wife Lottie E. Dunbar of Ashburnham, Worcester Co., Massachusetts, giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever, requisite and necessary to be done in and about the premises, as fully to all intents and purposes as I might or could do, if personally present, with full power of substitution and revocation; hereby ratifying and confirming all that my

said attorney shall lawfully do, or cause to be done, by virtue hereof.

In witness whereof, I have hereunto set my hand this seventh day of May, in the year one thousand eight hundred and eighty-nine.

(Signed) H. B. DUNBAR.

Signed and acknowledged in presence of us—
W. H. DICKS.
J. P. P. BROWN.

STATE OF OHIO, } ss:
County of Hamilton, }

Be it remembered, that on this seventh day of May A. D. eighteen hundred and eighty-nine, before me, a notary public in and for said county, personally came H. B. Dunbar of Cincinnati, Ohio, the constituent in the foregoing letter of attorney, and acknowledged the signing thereof to be his voluntary act, for the uses and purposes therein mentioned.

In testimony whereof, I have hereunto subscribed my name and affixed my notarial seal, on the day and year last above mentioned.

[Notarial Seal, Hamilton County, O.].

WILLIAM H. DICKS,
Notary Public, Hamilton Co., O.

64 EXHIBIT 4. 1st.

Phœnix hotel, Edson J. Hill, manager.

CONCORD, N. H., 5/11, 1889.

Bishop W. W. Niles, Concord, N. H.

REVEREND SIR: After our lengthy conversation last evening relative to the affairs of Mr. and Mrs. H. B. Dunbar, I beg leave to make the following proposition on part of H. B. Dunbar, Esq., of Cincinnati, O. In the event of an action for divorce being filed and the same granted to said H. B. Dunbar—he is to pay Mrs. Lottie E. (pencil) five
Dunbar the sum of "four hundred dollars"—yearly—so long as she remains unmarried, and to the children Harry H. and Willie W. (pencil) $250.00 (pencil) severally
"two hundred dollars each—yearly until they A arrive at the age of (pencil) they
14 years. After the age of 14 years to receive such extra allowance, yearly, as will give them a good and sufficient education befitting (pencil) and a suitable maintenance until they reach the age of 21 years
their station in life A. You are to advise the accepting of the within proposition and in no event are you to assist by advice or (pencil) or the divorce contested
with money the contest for divorce. If such be done A this letter is to be returned to the undersigned (pencil) and be of no effect.

Very truly yours,

(Signed) L. K. TORBET,
Att'y for H. B. Dunbar.

L. K. Torbet, att'y, 78 & 79 Johnston bldg., Cincinnati, O.

(Exact copy.) (2.)

EXHIBIT 5.

J. W. Johnson. George G. Mann.

The Quincy, American and European plan. J. W. Johnson & Co., Boston.

BOSTON, 5/11, 1889.

Rt. Rev. W. W. Niles, Concord, N. H.

REVEREND SIR: After our lengthy conversation last evening relative to the affairs of Mr. and Mrs. H. B. Dunbar, I beg leave to make the following proposition on part of H. B. Dunbar, Esq., of Cincinnati, O. In the event of an action for divorce being filed and the same granted to said H. B. Dunbar—he is to pay Mrs. Lottie E. Dunbar the sum of five hundred dollars "yearly, so long as she remains unmarried, and to the children Harry H. and Willie
65 W. two hundred and fifty dollars" each, yearly, until they severally arrive at the age of 14 years. After that age they to receive such extra allowance yearly, as will give them a good and sufficient education befitting their station in life, and a suitable maintenance until they reach the age of 21 years. You are to advise the accepting of the above proposition, and in no event are you to assist by advice or with money the contest for divorce. If such be done then this letter is to be returned to the undersigned and be of no effect.

Respectfully yours, L. K. TORBET,
Att'y for H. B. Dunbar.

Office, 78 & 79 Johnson building, Cincinnati, O.

(Copy.)

EXHIBIT 6. (3.)

J. W. Johnson. George G. Mann.

The Quincy, American and European plans. J. W. Johnson & Co., Boston.

BOSTON, 5/11, 1889.
CINCINNATI, O., *May 20th.*

Rt. Rev. W. W. Niles, Concord, N. H.

REVEREND SIR: After our lengthy conversation on the 10th relative to the affairs of Mr. and Mrs. H. B. Dunbar, I beg leave to make the following proposition on the part of H. B. Dunbar, Esq., of this city. In the event of an action for divorce being filed and the same granted to H. B. Dunbar—he is to pay Mrs. Lottie E. Dunbar the sum of "five hundred dollars" yearly—so long as she remains unmarried and to the children Harry H. and Willie W. "two hundred and fifty dollars" each, yearly until they severally arrive at the age of 14 years. After that age they to receive such extra allowance yearly, as will give them a good and sufficient education befitting their station in life and a suitable maintenance until

they reach the age of 21 years—and the children are to remain in their mother's custody. You are to advise the accepting of the above proposition and in no event are you to assist by advice or with money the contest for divorce. If such be done then this letter is to be returned to the undersigned and be of no effect.

Very respectfully,

(Signed) L. K. TORBET,
Att'y for H. B. Dunbar.

Office, 78 & 79 Johnston bldg., Cincinnati, O.

66 No. 1. EXHIBIT 7.

CONCORD, N. H., *May 17th*, 1889.

L. K. Torbet, Esq., att'y for H. B. Dunbar.

DEAR SIR: Absence and continually pressing engagements have hindered me in replying to your note of the 11th inst. The terms and the points written in your letter are as I understood them in the main, and in all things vital to Mrs. Dunbar, but the wording of the paragraph at the end (by which I have drawn a line) is not quite what I intended. I did not mean to bind myself to *do* anything whatsoever of a positive nature, but only to declare in consideration of the things here guaranteed for her and her children, that is my purpose not to *do* anything; and to have your agreement with me void if either I *oppose* with advice or money, or if *she* opposes with or without my advice.

I shall have her make no compact with me, but she knows how the matter looks to me—that she could with much pain and money probably defeat the divorce; *but that she cannot fight love* into *existence* and that she is under no obligation to try, and I think it looks the same to her. Were aught alleged or intimated against her character or behavior, the case would be different, and contest I would urge her and help her to make.

I would like your document then to be rewritten so that the closing paragraph shall read as follows: "You for your part, it is understood, will not assist by advice or with money the contest for divorce. If such assistance be given or if a contest be made, this agreement is to be void and of no effect, and this letter to be returned to me."

This I believe will cover all that you want, and will exactly suit me. Moreover, it releases you in case she were, without *my advice or help*, to make a contest, while your sentence does not so plainly do this. If you please then, once more write the letter so amended, and forward it to me.

Very truly yours,

(Signed) W. W. NILES.

P. S.—I wrote in a sentence touching the custody of the children. It is implied in what you wrote, but not exactly stated. On reflection I do not see any good in my writing a strong personal letter to Mr. Dunbar.

EXHIBIT 8.

CINCINNATI, O., *May 20th*, '89.

Rt. Rev. W. W. Niles, Concord, N. H.

REVEREND SIR: After our lengthy conversation on the 10th relative to the affairs of Mr. and Mrs. H. B. Dunbar, I beg leave to make the following proposition on part of H. B. Dunbar, Esq., of
67 this city. In the event of an action for divorce being filed and the same granted, to H. B. Dunbar. He is to pay Mrs. Lottie E. Dunbar the sum of "five hundred dollars" yearly, so long as she remains unmarried and to the children Harry H. and Willie W. "two hundred and fifty dollars" each yearly until they severally arrive at the age of fourteen years: after that age they to receive such extra allowance yearly as will give them a good and sufficient education befitting their station in life and a suitable maintenance until they reach the age or twenty-one years and the children are to remain in the custody of their mother. You for your part, it is understood, will not assist by advice or with money the contest for divorce, if such assistance be given or if a contest be made, this agreement to be void and of no effect and this letter is to be returned to the undersigned.

Very respectfully,

(Signed) L. K. TORBET,
Att'y for H. B. Dunbar.

(*Memo. on Back.*)

Agreement with me of Attorney of H. B. Dunbar.

Being the "consideration" upon which Mr. Dunbar's formal contract *after* the divorce was based (that the person to whom that is addressed do not "assist" in the contesting of the suit.)

EXHIBIT 9.

CINCINNATI, 9/4, '89.

Rt. Rev. W. W. Niles, Concord, N. H.

MY DEAR SIR: Enclosed you will find properly executed binding agreement on part of H. B. Dunbar Esq. The same was drawn in confirmance to letter to you dated May 20/89. I am thankful to you for your interest and advice in this matter. Trust that we may meet again. With best wishes,

I am yours respt.,

(Signed) L. K. TORBET.

The defendant asked me to rule "that upon all the evidence the plaintiff is not entitled to recover." I refused so to rule.

The plaintiff asked me to rule "that the discharge in bankruptcy pleaded by the defendant was not a bar to any part of her claim." I declined so to rule as to so much of the plaintiff's declaration as

seeks to recover the sum of $333.33, "allowance due her for
68 support and maintenance of Willie W. Dunbar," and found and ordered judgment for the plaintiff in the sum of $429.04.

And now at the request of the parties the case is reported to the supreme judicial court. And by agreement of parties if both rulings were right, judgment is to be affirmed; otherwise such judgment to be entered as law and justice may require.

HENRY K. BRALEY,
Justice Superior Court.

October 24, 1900.

Copy,
Attest: JOS. A. WILLARD, *Clerk.*

Municipal Court of the City of Boston.

DUNBAR
v.
DUNBAR.

Amendment to Plaintiff's Declaration.

And now comes the plaintiff in the above-entitled action and moves to amend her declaration by inserting after the seventh line in the copy annexed, marked "A," the following: "Horace B. Dunbar agrees with the said Lottie E. Dunbar as follows;" so that said copy annexed, marked "A," shall read as follows:—

"Controversies having arisen concerning the agreement heretofore made between Horace B. Dunbar and Lottie E. Dunbar in September, 1889, in consideration of said Lottie E. Dunbar's forbearance of suit on such controversies, and in settlement of all such controversies and in substitution of said agreement of September, 1889, and in further consideration of the release by Lottie E. Dunbar, and in satisfaction of all claims under said original agreement, Horace B. Dunbar agrees with the said Lottie E. Dunbar as follows:—

That Horace B. Dunbar will pay to Lottie E. Dunbar during her life, or until she marries, for her maintenance and support, yearly, the sum of five hundred dollars, and will pay to her yearly, for the support and maintenance of her child Harry H. Dunbar, the sum of four hundred dollars until he shall attain the age of twenty-one years; and shall pay to her yearly, for the support and maintenance of her child Willie W. Dunbar, the sum of four hundred dollars until he shall attain the age of twenty-one years; all said sums to be paid in equal monthly instalments between the first and tenth of each and every month—the first instalment being for the month of May, 1896, shall be paid between the first and tenth of June, 1896.

And in addition to the foregoing said Horace B. Dunbar agrees to pay the further sum of one hundred dollars between the first and tenth of July, 1896, over and above the instalment otherwise due for said month.

And the said Lottie E. Dunbar hereby agrees that she has
69 not nor shall she have any other claim or demand against Horace B. Dunbar for contribution to her support and main-

tenance, or for the support, maintenance or education of said children, save and except as fixed and limited by this agreement."

HORACE B. DUNBAR. [SEAL.]
LOTTIE E. DUNBAR, [SEAL.]
By her attorney, FRANK H. STEWART.

Witness-:
GUSTAVUS H. WALD.
FRANK H. STEWART,
To L. E. D.

Defendant's Answer.

Now comes the defendant in the above-entitled cause, and for answer denies each and every allegation in the plaintiff's writ and declaration contained.

And further answering says that the defendant became a bankrupt on his voluntary petition, and that the plaintiff was named as a creditor in the defendant's petition in bankruptcy; that due notices were mailed to her as such creditor; that the plaintiff appeared by attorney at the first creditors' meeting of the defendant in bankruptcy and voted for a trustee in bankruptcy, and the defendant says that on the 24th day of April, A. D. 1899, he was granted a discharge in bankruptcy, a copy whereof is hereto annexed and marked "A," and said discharge is a full and complete bar to the plaintiff's claim.

By his attorney, GEO. FRED WILLIAMS.

"A."

United States District Court in Bankruptcy, Southern District of Ohio, Western Division.

In re HORACE B. DUNBAR, Bankrupt. No. 2521.

This is to certify, that on December 2, 1898, Horace B. Dunbar filed his petition in bankruptcy in this court, alleging among other things that he then was, and for more than six months had been, a resident and citizen of Cincinnati, in this district, and that he owed debts which he was unable to pay, and prayed to be adjudged a bankrupt. Said petition was accompanied by duly verified
70 schedules. The schedule of creditors contained, among others, the following: "Lottie E. Dunbar, residence Charlestown, Mass., amount, $540.00, for alimony due to said date, and $1300.00, also for alimony, payable yearly; no security."

And thereupon said Horace B. Dunbar was by this court adjudicated a bankrupt, and the cause was referred to Morrison R. Waite, as referee.

And thereupon notice was duly published and also mailed to each creditor, including said Lottie E. Dunbar, to their respective addresses, of the filing of said petition, and of the first meeting of creditors to be held on February 7, 1899.

And on February 7, 1899, said first meeting of creditors was held

before the said referee, who thereafter returned, among other things, that Lottie E. Dunbar had appeared by attorney, who produced and filed his power of attorney duly executed, and had filed her claim for $691.63, for instalments of alimony due to December, 1898.

And afterwards, on February 17, 1899, said Horace B. Dunbar duly filed his petition in discharge.

And thereupon the court ordered that the hearing of said petition for discharge be set for April 24, 1899, and that the same be advertised in the Court Index, which was done, and that the clerk mail notices of said hearing to each creditor, and thereupon the clerk mailed said notices to each creditor, including said Lottie E. Dunbar, in conformity with the statute and the orders of the court.

And on April 24, 1899, said petition for discharge came on for hearing, and the court, on consideration thereof, made an order as follows:

Whereas, Horace B. Dunbar, of Cincinnati, Ohio, in said district, has been duly adjudged a bankrupt under the acts of Congress relating to bankruptcy, and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered by this court that said Horace B. Dunbar be discharged from all debts and claims which are made provable by said acts against his estate, and which existed on the 2d day of December, A. D. 1898, on which day the petition for adjudication was filed by him; excepting such debts as are by law excepted from the operation of a discharge in bankruptcy.

And on the same day a certificate of discharge was issued to said Horace B. Dunbar.

Attest: R. R. COWEN, *Clerk*,
By R. C. GEORGE, *Deputy*.

Cincinnati, Ohio, October 16, 1899.

71 *Motion to Amend.*

And now the defendant comes and moves to amend his answer by filing an attested copy of proceedings and discharge in bankruptcy in the place of a copy of the attested copy which has been filed with the answer.

By his attorney, GEORGE FRED WILLIAMS.

Defendant's Motion to Amend Answer.

Now comes the defendant in the above action and moves to amend his answer by adding thereto the following: "and defendant further answering says that the alleged contract set forth in plaintiff's declaration was without consideration, and also that the said contract was entered into upon an unlawful consideration and upon an agreement that the plaintiff should permit defendant's libel for divorce to be granted without contest, and said argument was contrary to the policy of the law and void."

By his attorney, GEORGE FRED WILLIAMS.

72 [Endorsed:] No. 1752 Lottie E. Dunbar *v.* Horace B. Dunbar. Report. Suffolk county.

73 COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss:*

Superior Court.

LOTTIE E. DUNBAR
vs.
HORACE B. DUNBAR.

Defendant's Motion for Extension of Time in which to File Exceptions.

Now comes the defendant in the above-entitled cause, and moves that the time for filing his exceptions in said cause be further extended to August 31st, A. D. 1900.

By his attorneys, GEO. FRED WILLIAMS &
JAMES A. HALLORAN.

Copy,
Attest: JOS. A. WILLARD, *Clerk.*

74 [Endorsed:] 4632 4. Commonwealth of Mass., Suffolk, *ss.* Superior court Lottie E. Dunbar *vs.* Horace B. Dunbar Def't's motion to extend time for filing exceptions July 16, 1900 Allowed Henry K. Braley J. S. C. Copy. From the office of Geo. Fred Williams & James A. Halloran 209 Wash'n St., Boston, Mass. July 16, 1900.

75 COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss:*

Superior Court.

LOTTIE E. DUNBAR
vs.
HORACE B. DUNBAR. } # 11545.

Defendant's Motion for Extension of Time in which to File Exceptions.

Now comes the defendant in the above-entitled cause and moves that the time for filing his exceptions in said cause be extended to July 31st, A. D. 1900.

By his attorneys, GEO. FRED WILLIAMS,
JAMES A. HALLORAN.

Copy,
Attest: JOS. A. WILLARD, *Clerk.*

76 [Endorsed:] 4632 3 Commonwealth of Massachusetts, Suffolk, *ss.* Superior court. Lottie E. Dunbar *vs.* Horace B. Dunbar Copy. Defendant's motion for extension of time to file exceptions E. Suffolk clerk's office Filed 1900 14, Jun-. Jos. A. Willard, cl'k superior court I assent to the allowance of within

motion J. O. Teele, att'y for pl'ff. June 14, 1900 Allowed H. K. B., J. S. C. From the office of Geo. Fred Williams 209 Washington St., Boston. Room 50.

77 SUFFOLK, *ss:*

Superior Court, April Sitting, 1900.

LOTTIE E. DUNBAR, Pl'ff,
—
HORACE B. DUNBAR, D'f't.

In the above action the court finds for the plaintiff and assess damages in the sum of four hundred twenty-nine 04/100 dollars.

HENRY K. BRALLY,
Justice Superior Court.

Memorandum.

The defendant asked me to rule that upon all the evidence the plaintiff was not entitled to recover. I refused so to rule and saved the exception of the defendant.

The plaintiff asked me to rule that the discharge in bankruptcy pleaded by the defendant was not a bar to any part of her claim. I declined so to rule as to so much of the plaintiff's declaration as seeks to recover the sum of $333.33 "allowance due her for support and maintenance of Willie W. Dunbar" and saved her exception to the refusal to rule.

June 7, 1900.

H. K. B., *J. S. C.*

Copy.
Attest: JOS. A. WILLARD, *Clerk.*

78 [Endorsed:] 4632 Dunbar *vs.* Dunbar Court finds for pl'ff. Damages $429.04 April sitting 1900. viz: June 12, 1900 Copy.

79 No. 4632. J. W. May.

SUFFOLK, *ss:*

Superior Court, —— Sitting 1900.

DUNBAR, Pl'ff,
v.
DUNBAR, D'f't.

In the above action I appear for pl'ff.

J. O. TEELE.

E Suffolk clerk's office Filed Apr. 4, 1900.

JOS. A. WILLARD,
Cl'k Superior Court.

Copy,
Attest: JOS. A. WILLARD, *Clerk.*

80 COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } ss:

Superior Court.

LOTTIE E. DUNBAR } *vs.* HORACE B. DUNBAR. } No. 11545.

Defendant's Motion to Amend Answer.

Now comes the defendant in the above action and moves to amend his answer by adding thereto the following:

"And defendant further answering says that the alleged contract set forth in plaintiff's declaration was without consideration, and also that the said contract was entered into upon an unlawful consideration & upon an agreement that the plaintiff should permit defendant's libel for divorce to be granted without contest, and said agreement was contrary to the policy of the law & void."

By his attorney, GEO. FRED WILLIAMS.

Copy,
Attest: JOS. A. WILLARD, *Clerk*.

81 [Endorsed:] 4632 Lottie E. Dunbar *v.* Horace B. Dunbar Copy. Defendant's motion to amend answer. This may be filed. F. H. Stewart pl'ff's attorney. E Suffolk clerk's office Filed Apr. 10. 1900 Jos. A. Willard cl'k superior court.

82 COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } ss:

At the municipal court of the city of Boston, holden at said Boston, within the county of Suffolk, for civil business, on the twenty-second day of December, in the year of our Lord one thousand and eight hundred and ninety-nine.

LOTTIE E. DUNBAR, Plaintiff, } *vs.* HORACE B. DUNBAR, Defendant. }

Contract.

I hereby certify that the above-entitled action was duly entered in said court, on the fourteenth day of October, A. D. 1899.

Oct. 18, 1899.—Def't files ans. and plea of discharge in bankruptcy.

Oct. 18, 1899.—Def't's mo. to amend ans. filed & all'd.

Nov. 2 & 3, 1899.—Trial.

Nov. 3, 1899.—Pl'ff's mo. to amend filed & all'd.

Dec. 16, 1899.—Court finds for def't.

Def't's costs $9.13.

From which said judgment the said plaintiff appealed to the superior court, and within the time prescribed by law, to wit: December 23. 1899 at 9.45 a. m. filed a bond with surety, to prosecute said appeal at said superior court, to be holden at said Boston, within

and for the county of Suffolk, for the transaction of civil business, on the first Monday of January 1900.

ORSINO G. SLEEPER, *Clerk.*

Copy.
Attest:

JOS. A. WILLARD,
Clerk of Superior Court.

83 [Endorsed:] No. 4632. Lottie E. Dunbar, pl'ff. vs. Horace B. Dunbar, d'f't. Certificate of proceedings. Appealed. Copy. For pl'f. Frank H. Stewart. For d'f't. Geo. Fred Williams James A. Halloran.

84 Know all men by these presents, that we, Lottie E. Dunbar of Ashburnham in the county of Worcester and Commonwealth of Massachusetts, as principal, and Harry H. Dunbar as surety, are holden and stand firmly bound and obliged unto Horace B. Dunbar in the full and just sum of one hundred dollars, to be paid unto the said Horace B. Dunbar and his executors, administrators, or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, dated at Boston, the twenty-third day of December in the year of our Lord one thousand eight hundred and ninety-nine.

The condition of this obligation is such, that whereas the said Horace B. Dunbar by the consideration of the justices of the municipal court of the city of Boston, holden at said Boston, within the county of Suffolk, for civil business, on the twenty-second day of December in the year of our Lord one thousand eight hundred and ninety-nine recovered judgment against the said Lottie E. Dunbar for the costs of suit taxed at nine dollars and thirteen cents, in a personal action brought by said Lottie E. Dunbar against said Horace B. Dunbar in which the said Lottie E. Dunbar set her damages at one thousand dollars.

From which judgment the said Lottie E. Dunbar appealed to the superior court to be holden at said Boston, within and for the county of Suffolk, for the transaction of civil business, on the first Monday of January, A. D. 1900.

Now if the said Lottie E. Dunbar shall enter and prosecute her said appeal at said superior court with effect, and satisfy any judgment which may be entered against her in said superior court upon said appeal for costs within thirty days of the entry of such judgment; then this obligation to be void, otherwise to abide in full force, power and virtue.

LOTTIE E. DUNBAR. [SEAL.]
HARRY H. DUNBAR. [SEAL.]

Signed and sealed in presence of
MOSES P. GREENWOOD, to L. E. D.
A. P. TEELE, to H. H. D.

Copy.
Attest:

JOS. A. WILLARD, *Clerk.*

85 [Endorsed:] Municipal court of the city of Boston, for civil business. No. 4632 1899. Lottie E. Dunbar *vs.* Horace B. Dunbar. Bond to pros. appeal. Surety approved Dec. 23, 1899. Bond filed at 9.45 a. m. Walter F. Frederick, ass't clerk. Copy. The within-named surety is acceptable to the def't Geo. Fred Williams & James A. Halloran, att'ys for defendant.

86 COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss:*

Municipal Court of the City of Boston for Civil Business.

DUNBAR *vs.* DUNBAR. } No. 10829.

Motion to Amend.

And now the defendant comes and moves to amend his answer by filing an attested copy of proceedings & discharge in bankruptcy in the place of a copy of the attested copy which has been filed with the answer.

By his attorney, GEO. FRED WILLIAMS.

Copy,
Attest: JOS. A. WILLARD, *Clerk.*

87 [Endorsed:] 4632 Municipal court of the city of Boston for civil business. 1899 Dunbar *vs.* Dunbar. Copy Motion to amend answer. Geo. Fred Williams att'y for defendant. Municipal court Filed & all'd. Oct. 18, 1899 H. S. D.

88 COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss:*

Municipal Court of the City of Boston.

LOTTIE E. DUNBAR *vs.* HORACE B. DUNBAR. }

Contract.

Defendant's Answer.

Now comes the defendant in the above-entitled cause, and for answer denies each and every allegation in the plaintiff's writ and declaration contained.

And further answering says that the defendant became a bankrupt on his voluntary petition, and that the plaintiff was named as a creditor in the defendant's petition in bankruptcy; that due notices were mailed to her as such creditor; that the plaintiff appeared by attorney at the first creditors' meeting of the defendant

in bankruptcy and voted for a trustee in bankruptcy, and the defendant says that on the 24th day of April A. D. 1899 he was granted a discharge in bankruptcy, a copy whereof is hereto annexed and marked "A," and said discharge is a full and complete bar to the plaintiff's claim.

By his attorney, GEO. FRED WILLIAMS.

89 "A."

United States District Court in Bankruptcy, Southern District of Ohio, Western Division.

In re HORACE B. DUNBAR. Bankrupt. No. 2521.

This is to certify that on December 2nd, 1898 Horace B. Dunbar filed his petition in bankruptcy in this court alleging among other things that he then was, and for more than six months had been, a resident and citizen of Cincinnati in this district, and that he owed debts which he was unable to pay, and prayed to be adjudged a bankrupt. Said petition was accompanied by duly verified schedules. The schedule of creditors contained among others the following: Lottie E. Dunbar, residence Charlestown, Mass., amount $540.00 for alimony due to said date, and $1300.00, also for alimony, payable yearly; no security.

And thereupon said Horace B. Dunbar was by this court adjudicated a bankrupt and the cause was referred to Morrison R. Waite as referee.

And thereupon notice was duly published and also mailed to each creditor, including said Lottie E. Dunbar, to their respective addresses, of the filing of said petition and of the first meeting of creditors to be held on Feb. 7th, 1899.

And on Feb. 7th, 1899 said first meeting of creditors was held before the said referee, who thereafter returned among other things that Lottie E. Dunbar had appeared by attorney, who produced and filed his power of attorney duly executed, and had filed her claim for $691.63 for instalments of alimony due to Dec. 1898.

90 And afterwards on Feb. 17th, 1899 said Horace B. Dunbar duly filed his petition in discharge.

And thereupon the court ordered that the hearing of said petition for discharge be set for April 24th, 1899, and that the same be advertised in the Court Index, which was done, and that the clerk mail notices of said hearing to each creditor, and thereupon the clerk mailed said notices to each creditor including said Lottie E. Dunbar in conformity with the statute and the orders of the court.

And on April 24th, 1899 said petition for discharge came on for hearing and the court on consideration thereof made an order as follows:

Whereas, Horace B. Dunbar, of Cincinnati, Ohio, in said district, has been duly adjudged a bankrupt under the acts of Congress relating to bankruptcy, and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered by this court, that said Horace B. Dunbar be discharged from all debts and

claims which are made provable by said acts against his estate and which existed on the 2nd day of December, A. D. 1898, on which day the petition for adjudication was filed by him; excepting such debts as are by law excepted from the operation of a discharge in bankruptcy.

And on the same day a certificate of discharge was issued to said Horace B. Dunbar.

Attest: R. R. COWEN, *Clerk*,
[SEAL.] By R. C. GEORGE, *Deputy*.

Cincinnati, O. October 16, 1899.

Copy,
Attest: JOS. A. WILLARD, *Clerk*.

91 [Endorsed:] 4632. Com. of Mass. Suffolk, *ss*. Municipal court of the city of Boston, of 1899. Lottie E. Dunbar *vs*. Horace B. Dunbar. Contract. Copy. Defendant's answer. Municipal court. Filed Oct. 18, 1899, for civil business Office of Geo. Fred Williams 209 Washington St. Boston, Mass.

92 Municipal Court of the City of Boston.

DUNBAR
vs.
DUNBAR.

Amendment to Plaintiff's Declaration.

And now comes the plaintiff in the above-entitled action and moves to amend her declaration by inserting after the seventh line in the copy annexed marked "A," the following:—"Horace B. Dunbar agrees with the said Lottie E. Dunbar as follows;" so that said copy annexed marked "A" shall read as follows:—

"Controversies having arisen concerning the agreement heretofore made between Horace B. Dunbar and Lottie E. Dunbar in September 1889: In consideration of said Lottie E. Dunbar's forbearance of suit on such controversies, and in settlement of all such controversies and in substitution of said agreement of September 1889 and in further consideration of the release by Lottie E. Dunbar and in satisfaction of all claims under said original agreement, Horace B. Dunbar agrees with the said Lottie E. Dunbar as follows:

That Horace B. Dunbar will pay to Lottie E. Dunbar during her life, or until she marries, for her maintenance and support, yearly, the sum of five hundred dollars, and will pay to her yearly for the support and maintenance of her child Harry H. Dunbar the sum of four hundred dollars until he shall attain the age of twenty-
93 one years; and shall pay to her yearly for the support and maintenance of her child Willie W. Dunbar the sum of four hundred dollars until he shall attain the age of twenty-one years, all said sums to be paid in equal monthly installments between the first

and tenth of each and every month—the first installment being for the month of May, 1896, shall be paid between the first and tenth day of June, 1896.

And in addition to the foregoing said Horace B. Dunbar agrees to pay the further sum of one hundred dollars between the first and tenth of July 1896, over and above the installment otherwise due for said month.

And the said Lottie E. Dunbar hereby agrees that she had not nor shall she have any other claim or demand against Horace B. Dunbar for contribution to her support and maintenance or for the support maintenance or education of said children save and except as fixed and limited by this agreement."

(Signed) HORACE B. DUNBAR. [SEAL.]
LOTTIE E. DUNBAR, [SEAL.]
By her attorney, FRANK H. STEWART.

Witness-:
(Signed) GUSTAVUS H. WALD.
FRANK H. STEWART,
To L. E. D.

Copy.
Attest: JOS. A. WILLARD, *Clerk.*

94 [Endorsed:] 4632. Dunbar *v.* Dunbar Motion to amend declaration. Filed Nov. 3, 1899. Copy.

95 *Mesne Process.—Certificate of Recognizance.*

COMMONWEALTH OF MASSACHUSETTS, } ss:
County of Suffolk, }

OCTOBER 2ND, 1899.

I certify that Horace B. Dunbar, the defendant named in the annexed writ having been arrested, and now held in custody by Albert C. Tilden, deputy sheriff, by virtue of said writ, is before me to recognize with surety for his appearance for examination before some court having jurisdiction to examine him as provided in chapter 419, Acts of the Year 1888, and under the provisions of chapter 162 of the Public Statutes, and amendments thereto, and said defendant did then and there recognize in due form, with Wm. H. Lapointe of Boston county of Suffolk in the sum of $1000 that some day before the fourteenth day of October 1899, that being the return day of said writ, said defendant will appear before said court for said examination, first giving notice to the plaintiff, as required by law, of his intention so to do.

EDWARD J. JONES,
Master in Chancery.

(10 10 I. R. stamp Oct. 4, '99.)
(Endorsed.)

96 Edward J. Jones, master in chancery, 61 Court street, Boston.

Affidavit of arrest, mesne process, P. S., chap. 162, sec. 1.

Contract.

Mesne process.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } ss:

BOSTON, *Oct. 2nd, A. D.* 1899.

I, Harry H. Dunbar in behalf of the plaintiff named in the annexed writ, do on oath declare, that the plaintiff has a good cause of action against the defendant Horace B. Dunbar therein named, and a reasonable expectation of recovering a sum amounting to twenty dollars exclusive of all costs which have accrued in any former action; and that I believe and have reason to believe, that Horace B. Dunbar the said defendant has property not exempt from being taken on execution, which he does not intend to apply to the payment of the plaintiff's claim; and that I believe, and have reason to believe that he intends to leave the State, so that execution, if obtained, cannot be served upon him.

HARRY H. DUNBAR.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } ss:

BOSTON, *Oct. 2d, A. D.* 1899.

Personally appeared the above-named Harry H. Dunbar before me, and made oath to the truth of the above affidavit by him subscribed; and I certify that after due hearing I am satisfied the same is true.

And satisfactory cause having been shown, I authorize the arrest of said Horace B. Dunbar the said defendant, if his arrest is authorized by law to be made after sunset.

Fee, $1.

EDWARD J. JONES,
Master in Chancery.

(10 10 I. R. stamp. Endorsed Oct. 2, 1899.)

97 Municipal Court of the City of Boston.

LOTTIE E. DUNBAR
vs.
HORACE B. DUNBAR.

Plaintiff's Declaration.

And the plaintiff says the defendant made a contract in writing a copy of which is hereto annexed marked "A," whereby the defendant promised to pay the plaintiff the sum of five hundred dollars ($500)

yearly for her support and maintenance, and four hundred dollars ($400) yearly for the support and maintenance of her child, Willie W. Dunbar. And the plaintiff says the defendant owes her under said contract seven hundred forty-nine dollars and ninety cents ($749.90) according to the account hereto annexed marked "B."

By her attorney, FRANK H. STEWART.

Copy Annexed.

"A."

Controversies having arisen concerning the agreement heretofore made between Horace B. Dunbar and Lottie E. Dunbar in September, 1889 in consideration of said Lottie E. Dunbar's forbearing of suit on such controversies, and in settlement of all such controversies and in substitution of said agreement of September 1889 and in further consideration of the release by Lottie E. Dunbar and
98 in satisfaction of all claims under said original agreement,

That Horace B. Dunbar will pay to Lottie E. Dunbar during her life, or until she marries, for her maintenance and support, yearly, the sum of five hundred dollars, and will pay to her yearly for the support and maintenance of her child Harry H. Dunbar the sum of four hundred dollars until he shall attain the age of twenty-one years; and shall pay her yearly for the support and maintenance of her child Willie W. Dunbar the sum of four hundred dollars until he shall attain the age of twenty-one years, all said sums to be paid in equal monthly installments between the first and tenth of each and every month—the first installment being for the month of May 1896, shall be paid between the first and tenth of June, 1896.

And in addition to the foregoing said Horace B. Dunbar agrees to pay the further sum of one hundred dollars between the first and tenth of July, 1896, over and above the installment otherwise due for said month.

And the said Lottie E. Dunbar hereby agrees that she has not nor shall she have any other claim or demand against Horace B. Dunbar for contribution to her support and maintenance or for the support or education of said children save and except as fixed and limited by this agreement.

(Signed) HORACE B. DUNBAR. [SEAL.]
LOTTIE E. DUNBAR. [SEAL.]

Witness:
(Signed) GUSTAVUS H. WALD,
FRANK H. STEWART,
To L. E. D.

99 *Account Annexed.*

"B."

BOSTON, *Oct.* 2, 1899.

Horace B. Dunbar to Lottie E. Dunbar, Dr.

1. To installments due under covenant for alimony from December, 1898, to Oct. 1, 1899, 10 months at $41.66 a month	$416.60
2. To monthly allowance due her for support and maintenance of Willie W. Dunbar, from December, 1898, to Oct. 1, 1899, 10 months at $33.33 a month	333.30
3. Total	$749.90

100 COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss:*

[L. S.] To the sheriff of our county of Suffolk or his deputy or any constable of the city of Boston, within our said county, Greeting:

We command you to attach the goods or estate of Horace B. Dunbar, commorant of said Boston, to the value of one thousand dollars: and for want thereof to take the body of the said defendant (if he may be found in your precinct), and him safely keep so that he may be had before our justices of the municipal court of the city of Boston, to be holden at said Boston, within said county of Suffolk, for civil business, on Saturday, the fourteenth day of October, A. D. 1899, at nine of the clock in the forenoon; then and there to answer to Lottie E. Dunbar of Boston in the county of Suffolk, plaintiff, in an action of contract to the damage of the said plaintiff, (as she says) the sum of one thousand dollars, as shall then and there appear, with other due damages. And have you there this writ with your doings therein.

Witness, William E. Parmenter, Esquire, at Boston aforesaid, the second day of October, in the year of our Lord one thousand eight hundred and ninety-nine.

ORSINO G. SLEEPER, *Clerk.*

Copy
Attest:

JOS. A. WILLARD,
Clerk of the Superior Court.

101 [Endorsed:] Municipal court of the city of Boston. For civil business. 1899. No. 4632. Lottie E. Dunbar, pl'f, *vs.* Horace B. Dunbar, d'f't. Damages, $—. Dec. 22 '99, judg't for def't.

Costs:

Writ	1.00
Entry	1.00

Def't's costs:

Att'y	2.50
Term fee	3.00
Trav.	.99
Attend	2.64
Wit.	
	$9.13

Copy from the office of —— ——. For d'f't, Geo. Fred Williams & James A. Halloran, 209 Wash'n St., r'm 50, Boston.

Extra compensation will not be allowed unless the officer's return contains a bill of items, together with his affidavit.

Officer's Return.

SUFFOLK, ss:

BOSTON, *October* 2*nd*, 1899.

By virtue of this writ, I this day arrested the within-named defendant Horace B. Dunbar and afterwards on the same day I had him before Edward J. Jones, Esq., a master in chancery within and for the county of Suffolk before whom he recognized with surety for his appearance before the 14th day of October current before some court having jurisdiction to examine him as a poor debtor. (See magistrate's certificate hereto annexed)

ALBERT C. TILDEN,
Deputy Sheriff.

Fees.

Arrest	1.00
Service	
Travel	.08
Custody & attendance	5.00
	$6.08

Endorsed on cover: File No. 18,407. Massachusetts superior court. Term No. 244. Horace B. Dunbar, plaintiff in error, *vs.* Lottie E. Dunbar. Filed February 18, 1902.

Supreme Court of the United States.

No. 244. — October Term, 1902.

HORACE B. DUNBAR, Plaintiff in Error,
v.
LOTTIE E. DUNBAR, Defendant in Error.

IN ERROR TO THE SUPERIOR COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

STATEMENT OF THE CASE.

This case is before this court on a writ of error to the Superior Court of the Commonwealth of Massachusetts. The plaintiff in error was married to the defendant in error on or about Aug. 19, A. D. 1871, at Boston, Mass. (record report, page 13), and two sons, Harry H. and Willie W., were born of this marriage. At the trial of the case in said Superior Court it was admitted and agreed that a divorce was granted to the plaintiff in error from the defendant in error in Ohio (Rec., p. 13), after due proceedings in the courts of said State, on the ground of her desertion. This was a divorce absolute at the date of the decree, viz., Aug. 8, 1889.

The record of the divorce proceedings duly certified and authenticated was produced and put in evidence as set forth in the report of the case. (Rec., p. 13.) At that time Harry was twelve years of age and Willie nine years of age. After this divorce had been granted to the plaintiff in error, an agreement so called was executed by the plaintiff in error, to wit, on or about the fourth day of September, A. D. 1889, which agreement is Exhibit 1 of the report. (Rec., p. 44.) This so-

called agreement was given in pursuance of certain agreements and understandings had by the parties prior to the application of the plaintiff in error for his divorce, and for the purpose of securing the decree of divorce without a contest. See Exhibits 4, 5, 6, 7, 8 and 9. (Rec., pp. 46 to 49 inclusive.)

Payments under this so-called agreement being in arrears in 1896, and controversies having arisen over the agreement, a new agreement (Exhibit 2, Rec., p. 45) was executed by both parties in settlement of these controversies, and in substitution for the so-called agreement of 1889, the terms of which contract will be hereinafter more specifically recited. Payments under this contract were made by the plaintiff in error until some months prior to Dec. 2, 1898 (Rec., p. 15, near bottom), viz., until June, 1898. (Rec., p. 17.)

On Dec. 2, 1898, the plaintiff in error, who had been for many years a resident of Cincinnati, in the State of Ohio, was adjudged a bankrupt on his voluntary petition in the United States District Court in Bankruptcy, Southern District of Ohio, Western Division, and on April 24, A. D. 1899, was discharged from all debts and claims which were made provable by the Acts of Congress relating to bankruptcy against his estate, which existed on said second day of December, A. D. 1898 (Rec., p. 15), as appears from a certified copy of the bankruptcy proceedings, made a part of the defendant's answer (Rec., p. 15). In the bankruptcy proceedings the defendant in error was named as a creditor in the bankruptcy schedule for the amount due under the contract to the date of the petition and for the instalments to accrue in the year subsequent thereto (Rec., p. 16); she was given notice of the filing of the petition and of the first meeting of creditors; and she appeared by an attorney, who produced and filed his power of attorney duly executed, and filed her claim for six hundred ninety-one and 63/100 (691.63) dollars for instalments due to the date of the adjudication under the agreement of 1896. (Rec., p. 16.)

By the terms of this agreement the plaintiff in error agreed to pay to the defendant in error "during her life, or until

she marries, for her maintenance and support, yearly, the sum of five hundred (500) dollars, and will pay to her yearly for the support and maintenance of her child, Harry H. Dunbar, the sum of four hundred (400) dollars until he shall attain the age of twenty-one (21) years; and shall pay her yearly for the support and maintenance of her child, Willie W. Dunbar, the sum of four hundred (400) dollars until he shall attain the age of twenty-one (21) years, all said sums to be paid in equal monthly instalments between the first and tenth of each and every month." (Rec., p. 59.) Harry H. Dunbar became of full age in 1898, and Willie W. Dunbar became of full age on Jan. 26th, 1901, the latter thus being nearly nineteen years of age when the plaintiff in error was declared a bankrupt, and the defendant in error was forty-six years of age at this time.

This action was commenced by a writ sued out of the Municipal Court of the City of Boston on the second day of October, A. D. 1899, by virtue of which writ the plaintiff in error was arrested. The cause of action as set forth in said writ is as follows: "And the plaintiff says the defendant made a contract in writing, a copy of which is hereto annexed, marked 'A,' whereby the defendant promised to pay the plaintiff the sum of five hundred (500) dollars yearly for her support and maintenance, and four hundred (400) dollars yearly for the support and maintenance of her child Willie W. Dunbar." And plaintiff says the defendant owes her under said contract seven hundred and forty-nine and 90/100 (749.90) dollars, according to the account hereto annexed, marked "B." (Rec., pp. 61 and 62.)

ACCOUNT ANNEXED.

"B".

HORACE B. DUNBAR — BOSTON, Oct. 2, 1889.

To LOTTIE E. DUNBAR, *Dr.*

1. To instalments due under covenant for alimony from December, 1898, to Oct. 1st, 1899, ten months at $41.66 a month $416 60

2. To monthly allowance due her for support and maintenance of Willie W. Dunbar from December, 1898, to October 1st, 1899, ten months at $33.33 a month $333 30

3. Total $749 90

(Rec., p. 63).

After a trial in said Municipal Court for the City of Boston, the Court found for the defendant, the plaintiff in error here, and an appeal was taken by the defendant in error from said court to the Superior Court aforesaid. After full hearing by said Court without a jury, the Court refused to rule "that upon all the evidence the plaintiff (defendant in error here) is not entitled to recover," and ruled that as to so much of plaintiff's declaration as seeks to recover the sum of three hundred thirty-three and 33/100 (333.33) dollars, allowance due her for the support and maintenance of Willie W. Dunbar, the discharge in bankruptcy pleaded by the defendant, the plaintiff in error here, was a bar to her claim, and found for the plaintiff on the other item of said account.

At the request of the parties the case was reported to the Supreme Judicial Court, and by agreement of parties, if above rulings were right, judgment was to be confirmed; otherwise such judgment was to be entered as law and justice might require. (Rec., pp. 49 and 50.)

After full hearing on the report made by said Court, the Supreme Judicial Court for the Commonwealth, on Dec. 31, 1901, ordered that the clerk of the Superior Court for the County of Suffolk, in which county the cause was tried, make the following entry under said case in the docket of said court: "Judgment to be entered for the plaintiff (the defendant in error here) for both branches of her claim." (Rec., p. 11.) The rescript handed down by said Supreme Judicial Court stated as one of the grounds and reasons for the decision as follows: "Contingent claims are not provable under the bank-

ruptcy act of 1898, and hence no part of the plaintiff's claim is barred by the defendant's discharge." (Rec., p. 12.)

The opinion of said Supreme Judicial Court was rendered by Barker, J., who said in part: "The defendant's contentions are that his discharge in bankruptcy is a bar to the suit." . . .

"Whether the bankruptcy act of 1898 allows the proof of contingent claims must depend finally upon the construction of the statute by the Federal Courts. This court in Morgan *v.* Woodell, 178 Mass. 350, expressed the opinion that one class of contingent claims was not so provable, and in Goding *v.* Rosenthal (61 N. E. Rep. 222; 180 Mass. 43) followed that expression of opinion by a decision to the same effect. If claims of the nature then held to be not provable are not provable, we see no ground for holding either class of obligations imposed upon the defendant by his contract of 1896 to be provable. The result is that the defendant's discharge in bankruptcy was not a bar to either branch of the plaintiff's claim now in suit." . . . (Rec., pp. 10 and 11.)

In accordance with the order of said Supreme Judicial Court on the sixth day of January, A. D. 1902, in said Superior Court sitting in and for said Suffolk County, final judgment was entered for the plaintiff, the defendant in error here, in the sum of eight hundred fifty-one and 66/100 (851.66) dollars damages, and costs of suit taxed at sixty-seven and 18/100 (67.18) dollars. (Rec., pp. 5 and 6.)

On the first day of February, A. D. 1902, the defendant, the plaintiff in error here, filed his suggestion and notice of his intention to sue out a writ of error in the Supreme Court of the United States on the said first day of February. On petition therefor said writ of error was granted and issued by the Supreme Court of the United States accordingly. (Rec., pp. 6 and 12.)

ASSIGNMENT OF ERRORS.

1. The Supreme Judicial Court of the Commonwealth of Massachusetts erred in its finding, ruling and order that the discharge of the plaintiff in error in bankruptcy under the national bankruptcy law of 1898 did not operate as a full and complete bar to the right of the defendant in error to recover on her claim in respect to and as a release from

(*a*) Instalments due to said defendant in error for the support and maintenance of said defendant in error;

(*b*) Instalments due for the support and maintenance of Willie W. Dunbar, the son of the defendant in error;

in consequence of which final judgment in the Superior Court sitting for Suffolk County in said Commonwealth was entered for said defendant in error.

2. The Supreme Judicial Court of said Commonwealth erred in its finding, ruling and order that the claim of the defendant in error was not a debt provable in the bankruptcy proceedings of the plaintiff in error, from which he was released by his discharge in bankruptcy, in consequence of which final judgment in the Superior Court sitting for said Suffolk County was entered for said defendant in error.

3. The Supreme Judicial Court erred in its finding, ruling and order that the obligations imposed upon the plaintiff in error by his said contract of 1896 were contingent claims within the meaning of the national bankruptcy law of 1898, both as to

(*a*) Instalments due to defendant in error for her support and maintenance, and

(*b*) Instalments due to the defendant in error for the support and maintenance of her son Willie W. Dunbar.

In consequence of which final judgment in said Superior Court was entered for the defendant in error.

BRIEF OF THE ARGUMENT.

Points and Authorities.

I.

The sole question raised by this writ of error is whether the discharge of the plaintiff in error granted under the National Bankruptcy Act of 1898 is a bar to the claim of the defendant in error for instalments which have accrued subsequent to the adjudication in bankruptcy under the contract upon which she rests her demand.

By Section 4 of the Bankruptcy Act "Any person who owes debts, except a corporation, shall be entitled to the benefits of this act as a voluntary bankrupt." The act further provides in Section 1 that "discharge" means "release of a bankrupt from all debts which are provable in bankruptcy except such as are excepted by this act"; and includes, in Section 63, among the debts which may be proved against his estate, —

"(1) A fixed liability as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not," and debts "(4) founded upon a contract express or implied."

It is further provided by Section 63 of the Act, that (*b*) "unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct and may thereafter be proved and allowed against his (the bankrupt's) estate."

And a "debt" is defined in Section 1 (11) to include "any debt, demand or claim provable in bankruptcy."

It is contended by the plaintiff in error that the claim of the defendant in error is a provable debt within the meaning of the sections just set forth.

(*a*) As the defendant in error was properly scheduled as a

creditor of the plaintiff in error in his bankruptcy petition, and as she had full notice of and appeared by attorney in the bankruptcy proceedings, her claim for future instalments under the agreement is barred if a provable debt, whether it was actually proved or not.

No recovery can be had in a State Court, on a debt that was provable against an estate in bankruptcy after the debtor has obtained a discharge under the national bankrupt law, whether proved or not, unless the debt in question belonged to one of the excepted classes.

Talbot *v.* Suit, 68 Md. 443; s. c. 13 Atlantic Rep. 356.
Withers *v.* Stinson, 79 N. C. 341.
Miller *v.* Chandler, 29 La. Ann. 88.
Mace *v.* Wells, 7 How. 172.

The defendant in error's claim does not fall within the classes of claims which are excepted by the act.

II.

It seems proper, before entering upon a discussion of the real controversy in this case, to consider the contention of the defendant in error as to the nature of her claim; viz.: that this claim is to be treated as alimony and based on a covenant made in lieu of alimony.

In the first place it is seriously doubted if any question as to the nature of this claim is open to review here. The errors which this court are asked to correct are those of the Supreme Judicial Court of Massachusetts in its construction of the Bankruptcy Act as applied to what that court has found to be a contract of an ordinary kind. That court has already construed the agreement in suit against the contention there made that it was alimony or a covenant for alimony. It is respectfully submitted that such a construction is conclusive on that question and that it is not open to this court to hold this agreement a covenant for alimony or alimony.

III.

But if the question is open to this court, then the plaintiff in error contends that the claim is not one for alimony, nor can it be treated as a covenant for alimony or in lieu of alimony with respect to the operation of a discharge in bankruptcy.

Alimony means decree for alimony, a judicial debt without the ordinary incidents of a contract.

As this Court said in Audubon *v.* Shufeldt, 181 U. S., at page 577, "Alimony does not arise from any business transaction, but from the relation of marriage. It is not founded on contract, expressed or implied, but on the natural and legal duty of the husband to support the wife. The general obligation to support is made specific by the decree of the court of appropriate jurisdiction. Generally speaking, alimony may be altered by that court at any time as the circumstances of the parties may require. . . . Permanent alimony is regarded rather as a portion of the husband's estate to which the wife is equitably entitled than as strictly a debt. . . ."

In re Nowell, 99 Fed. Rep. 931.

In Parsons *v.* Parsons, 9 N. H. 309, it was held that the term "alimony" meant the allowance made to a wife upon a divorce. And in Campbell *v.* Campbell, 37 Wisc. 206, it was held that alimony was not in itself an asset in the technical legal sense of that word, nor was it a charge "upon the husband's estate (if he has one), but is a mere personal charge upon, or duty of, the husband."

In Taylor *v.* Taylor, 93 N. C. 418, it was held that alimony is that portion of the husband's estate which is alloted to the wife for her support during the period of a judicial separation. It was held in Kinney *v.* Kinney, 1 Blackf. 481, that alimony was a term generally used to denote the portion allotted to a divorced wife out of a husband's property.

Further, it is held in most jurisdictions that alimony can only be obtained by decree on the granting of a divorce.

Darrow *v.* Darrow, 43 Iowa, 411.
Burrows *v.* Purple, 107 Mass. 428.
Fischli *v.* Fischli, 1 Blackf. 360.
Heyob *v.* Her husband, 18 La. Ann. 41.
Moore *v.* Moore, 18 La Ann. 613.
Shatwell *v.* Shatwell, 1 Smedes & M. Ch. 51.
Bowman *v.* Worthington, 24 Ark. 522.
Doyle *v.* Doyle, 26 Mo. 545.

The allowance of alimony, its amount and the time of its payment, are all within the discretion of the Court.

Bergen *v.* Bergen, 22 Ill. 187.
McDonough *v.* McDonough, 26 How. Prac. 193.
Jolliff *v.* Jolliff, 32 Ill. 527.
Brown *v.* Brown, 24 S. E. 238.
Call *v.* Call, 63 Me. 407.
McCarthy *v.* McCarthy, 143 New York, 235.
Downs *v.* Flanders, 150 Mass. 92.

Where the husband, as in this case, obtains a divorce for his wife's misconduct or fault there is a presumption that the wife is not entitled to alimony.

Perry *v.* Perry, 2 Barb. Ch. 311.
Spitler *v.* Spitler, 108 Ill. 120.
Am. and Eng. Encycl. of Law, 2d Ed., Vol. 2, p. 118.

The contract in this case was made many years after the divorce had been granted to the plaintiff in error, at a time when both parties were free and competent to contract as fully and completely as any individuals might do. It has not been contended, and there is absolutely no evidence, that the defendant in error sought or had any right to obtain alimony, and if she has any right to alimony this agreement in no way prevents its exercise by her. The Court which granted the divorce made

no decree with respect to alimony; it did not pass upon this contract nor any agreement into which these parties entered.

This is a case arising out of a contract which bears no relation to the question of alimony and cannot be so treated. Furthermore, the pleadings in the case show that it is treated purely as a contract by the defendant in error in bringing this action, and in the entire course of this litigation the agreement in suit is treated merely as a contract by all the courts of the Commonwealth of Massachusetts.

The provision made in this agreement for the support and maintenance of the son, Willie, is an essential part of the agreement, but it is in no sense a provision for alimony.

We are concerned, then, with the effect of a discharge in bankruptcy on a contract which is in in its nature a covenant not for alimony but for annuities.

IV.

The instrument upon which the present action is founded may be properly characterized as a covenant for annuities.

An annuity is defined to be "A yearly sum stipulated to be paid to another in fee for life, or years, and chargeable on the person of the grantor."

Black's Law Dictionary, p. 74.
Bouvier's Law Dictionary, Vol. 1, p. 144.
Co. Lit. 144 B.
Turrentine *v.* Perkins, 46 Ala. 631.
Booth *v.* Ammerman, 4 Bradf. Sur. 132.
Pearson *v.* Chase, 10 R. I. 455.
Holbrook *v.* Comstock, Admr., 16 Gray, 109.
Shrover *v.* Myrick, 4 Ind. App. 7.

An annuity may be created by contract.

Cox *v.* Maxwell, 151 Mass. 336.
Turrentine *v.* Perkins, 46 Ala. 631.

In Holbrook *v.* Comstock, Admr., 16 Gray (Mass.) 109, agreements which were in the form of bonds provided for the separation of the plaintiff and his wife, for the care, custody and maintenance of their children, for a division of property between them, and for the right to the wife to enjoy her property and dispose of it, whether given to her or earned by her, as if she were a *feme sole*. By the award of certain referees under these agreements the plaintiff was to pay the wife "fifteen dollars quarterly as long as the decision of the arbitrators should remain." The Court held that although the agreement provided that the arbitrators should award and determine "what allowance shall be made and paid by the said W. to the said A. by way of *alimony* for her support and maintenance, etc.," yet the word "alimony" was not used in its technical signification. That the allowance was to be received by the wife "rather as an annuity than as alimony."

In the case at bar the covenant of the plaintiff in error was a personal one and the obligations created by it were for the payment of stipulated yearly sums for certain periods of years, in the one case for life or until marriage, in the other during minority. It is difficult to conceive of a plainer case of the creation of annuities than that presented by this contract.

V.

The contract in this case is an entire contract, although it is one the performance of which on the part of the plaintiff in error required him to make various payments at various times. The consideration moving from the defendant in error was an entirely executed one. The only acts to be done were those to be performed by the plaintiff in error.

Schell *v.* Plumb, 55 N. Y. 592.

Kirkland *v.* Oates, 25 Ala. 465.

Lucesco Oil Co. *v.* Brewer, 66 Pa. St. 351.

Shaffer *v.* Lee, 8 Barbour, 412.

Wiggins *v.* Keizer, 6 Ind. 252.

In Schell *v.* Plumb, 55 N. Y. 592, it was held that an agreement to support one during life was an entire continuing contract.

A contract to be held severable must embrace several undertakings, each supported by a distinct consideration. It is one divisible in its nature and purposes, *i. e.*, susceptible of division and apportionment where the matters and things contemplated and embraced by it are not necessarily dependent upon each other, nor intended by the parties so to be.

Wooten *v.* Walters, 110 No. Car. 251.

Keeler *v.* Clifford, 165 Ill. 544.

Coos Bay Wagon Co. *v.* Crocker, 4 Fed. Rep. 577.

While the contract here is entire, yet the performance is divisible; so the claim of the defendant in error is based upon two distinct and independent obligations: one the obligation to pay the annual sum stated in monthly instalments to the defendant in error during her life or until she married; the other to pay another stated annual sum in monthly instalments to the defendant in error for her child, Willie, until he shall attain the age of twenty-one years. In this respect the agreement of the plaintiff in error imposed upon him two distinct duties of different limitations, one as to the defendant in error, another as to the son.

It is to be remembered that the defendant in error has thus treated the contract, as is shown by the form of the declaration and the separate items in the account (Rec., pp. 61–63); that the Superior Court thus treated it in its finding (Rec., pp. 49, 50), and the Supreme Judicial Court in its decision (Rec., p. 11).

VI.

The plaintiff in error submits that this claim, founded upon an express contract, is provable and barred by his discharge, because it can be liquidated within the meaning of Section 63, subdivision *b* of the Bankruptcy Act.

It is to be observed that the word "debt" is not given a confined and limited meaning in the act, but "shall" include any debt, demand or claim provable in bankruptcy, and this broad signification of the term "debt" is recognized in subdivision *b*, Sect. 63, by the provision that unliquidated *claims* may be liquidated as the court may direct and thereafter proved and allowed against the bankrupt's estate.

In re Hilton, 4 American Bankruptcy Reports, 774.

A.

The term "demand" is of much broader import than "debt," while the word "demand" is one of art of an extent greater than any other word in the law, except "claim." Co. Litt. 291 b.; 3 Co., by Thomas, 427. Vedder *v.* Vedder, 1 Denio, 257 (N. Y.)

In Denny *v.* Manhattan Co., 2 Hill (N. Y.), 223, the Court said that "it is clear that the term 'demand' is of much broader import than 'debt' and would embrace rights of action belonging to the debtor beyond those which could appropriately be called debts. In this respect, the term *demand* is one of very extensive import — among the most so, indeed, of any that are known to the law."

Hubbard, J., in Gray *v.* Bennett, 3 Mete. (Mass.) 522, 526.

Jemison *v.* Blowers, 5 Barbour (N. Y.), 686.

If, therefore, the claim in this case might be in any event a provable claim, then the defendant in error is bound to regard it as such and apply to the Court, pursuant to Section 63, subdivision *b*, to have it liquidated or abide by the consequences of her failure to do so.

As the Court said in *re* Hilton, 4 Am. B. R. 774, "I cannot doubt that the intent of these words, 'claim provable in bankruptcy' [Sect. 1, (11)] was to include every claim that under the provisions of the bankruptcy act *might be made provable;* and the definite provision of Section 63, *b*, for making unliquidated claims provable is, I think, precisely what is intended to be included in those words as distinguished from those words as 'debt.'"

If the claim in that case could be made provable, as the Court there held, then the claim in this case could be made provable.

Let us assume that the plaintiff in error had, instead of reverses which led to his bankruptcy, come into great wealth, so that he was well able to meet the demands of this contract; that he then notified the defendant in error that he repudiated the agreement, which he had made with her, and refused to be longer bound by it.

The right to break the contract cannot be denied him. Under such circumstances, what could the defendant in error do?

Unquestionably she was entitled to treat this agreement as absolutely broken, and bring suit immediately to recover in damages all that she had suffered by reason of the breach of the agreement as an entire contract.

In other words, she would not be compelled to await the time for the payment of each monthly instalment to arrive before she could bring her action and thus have to resort to endless litigation to secure her rights on the contract, but could elect to treat the agreement as terminated by the action of the plaintiff in error and have her damages assessed once and for all.

The Court would, in such a case, be compelled to liquidate her claim, and so far from finding it impossible, would find it no more difficult to accomplish than in many cases which are regularly presented to courts of law for adjustment.

U. S. *v.* Behan, 110 U. S. 338.
Pierce *v.* Tennessee Coal, etc., Co., 173 U. S. 1.
Roehm *v.* Horst, 178 U. S. 1.
Marks *v.* Van Eeghen, 85 Fed. 853.
In re Stern, 8 Am. B. R. 569.
Parker *v.* Russell, 133 Mass. 74.
James *v.* Allen County, 44 Ohio St. 226.
Eastern Tenn., etc., Railroad *v.* Staub, 7 Lea. 397.

Now this right of election, if it may be so called, may be exercised where bankruptcy intervenes. Repudiation of the contract, not only by the act of bankruptcy, but also by the

schedule naming the defendant in error as a creditor and by the notice given her, is as fully communicated as is repudiation in the case supposed above. And in this case, for more than six months prior to his bankruptcy, the plaintiff in error had utterly failed and refused to meet the obligations of the contract.

The contract in *re* Hilton, *ubi supra*, was for service at a stipulated salary for a term of years. The continuation of the contract was dependent upon the life of the party who was to render the service, so that in this respect the value of the contract to the parties at any given time prior to its termination by its own limitation was dependent upon the ability of one party to furnish the service, which was to be the consideration for the payment of the stipulated amounts, as salary, by the other party to the agreement. In other words, the agreement was executory on both sides. Yet these uncertainties or contingencies, if such they were, did not take the claim out of the operation of the bankruptcy law.

In the case at bar the consideration on the one hand was executed and executory only on the other. There was less uncertainty than in *re* Hilton. The period was as definitely fixed, having regard to life tables, so far as the life of the wife and the minority of the boy were concerned, and the sum to be paid was as certain in amount, as in *re* Hilton. That case, it is urged, is exactly analogous to the present case, so far as the instalments to be paid on account of the son is concerned. And in that case the right of election, so far as such a right existed, was exercised against treating the bankruptcy as a total breach of the contract, but inasmuch as the creditor might have so treated it, the Bankruptcy Act compelled it to be so treated and made it a provable debt.

Any other construction of the Bankruptcy Act would subvert its primary purpose to relieve insolvent debtors from their pecuniary liabilities as well as to secure ratable distribution of their assets among their creditors.

Moch *v.* Market St. Nat'l Bank, 107 Fed. R. 897.

Assume that claims of this nature are not provable because of this option given the creditor to treat the contract as broken once for all, or as continuing despite the bankruptcy, and we shall have a class of creditors who might, immediately after the proceedings of the bankrupt debtor were at an end and when presumably he was without resources, elect to treat the contract as broken and proceed to a recovery in damages for the full measure of the entire contract, and thus secure a judgment which would embarrass the debtor until paid or barred by new proceedings in bankruptcy.

The Bankruptcy Act, to accomplish its purpose, compels the creditor to elect to treat the contract as broken, and to prove his claim for the entire damages suffered by breach of it.

Ex parte Pollard, 2 Lowell, 411.

The contention here made finds strong support in the decisions made under the Act of 1841, where the language of the act was that persons having uncertain and contingent demands against the bankrupt "shall be *permitted* to come in and prove such debts and claims." It has been held under that act that creditors holding such demands were compelled to prove their claims, and that the discharge was a bar to such claims.

Mace *v.* Wells, 7 Howard, 172.

Jemison *v.* Blowers, 5 Barbour (N. Y.), 686.

The decisions in Hochster *v.* De La Tour, 2 El. & Bl. 678, and the cases confirming it, rest upon the ground that it is against public policy, and creates a hardship upon the party injured by the breach of a contract to compel him to withdraw himself from productive enterprise and await the time for final performance before his right of action upon it accrues.

But it is equally hard, where the contract calls for performance by instalments, to compel the injured party to await the successive failures and bring successive actions to recover for each as a separate breach.

A doctrine of law that promoted litigation by compelling a suit for each of a series of breaches of one contract is recognized

by the later decisions as serviceable neither to the public, nor to the injured party. Hence, the rule of damages in actions of contract has gravitated toward the rule of damages in actions of tort.

In Pierce *v.* Tennessee, etc., Railroad Co., 173 U. S., 1., this Court, after stating the old rule of damages in tort, said: "But the recent tendency of decisions in this country, in actions of contract as well as in actions of tort, has been towards allowing entire damages to be recovered once for all in a single action, and thus avoiding the embarrassment and annoyance of repeated litigation. This especially appears in well-considered opinions in cases of agreements to *furnish support* or to pay wages."

The rule laid down by this Court in that case gives the injured party his full measure of compensation, and levies upon the party in fault no greater burden than is necessary to furnish this recompense.

The party at fault is entitled to consideration, and in Tarbox *v.* Hortstein, 4 Baxt. (Tenn.) 78, the Court considers the question from that point of view. In that case a contract provided for stipulated wages for a stipulated period. Suit was brought and recovery had for the wrongful discharge of the plaintiff and damages were awarded for the amount which had accrued up to the time of the suit; later several more suits were instituted, the purpose being to sue for each week's wages for the balance of the contract period of employment. The Chancellor perpetually enjoined these later suits and the Supreme Court approved his action. The Court said: "There was but one breach, and the recovery in the first suit was an adjudication and recovery for such breach, and concluded the defendant from another recovery for the same cause of action. The Chancery Court clearly had jurisdiction of the case, in order to prevent vexatious as well as continued and repeated threatened litigation. According to the view of the defendant, twelve petty, but annoying yet unfounded suits, were to be brought

against the complainants, the expense of which might have been equal to more than the amount with costs."

The doctrine that all contracts have a present value to each party and such present value is the claim which each has against the other, lies at the bottom of suits for anticipatory breach and works justice to all parties.

In the case at bar there is an especial reason for the application of this doctrine.

The plaintiff in error is a bankrupt, and the law seeks to relieve him from the burden of his obligations. It would be strange if full relief should be denied because of a theory which considered only the hardship to the injured party, and thus permitted to remain upon the party in fault the very burdens from which the law would, otherwise, relieve him.

If the defendant in error had brought suit when the plaintiff in error defaulted on his first payment, or at the time of his bankruptcy, then in the language of this Court in Pierce *v.* Tennessee Coal, etc., Co., she could have recovered "the value of the contract to" her, "at the time of the breach, including all damages past or future resulting from a total breach of the contract."

She could recover thus only because the contract then had a present value to her that was capable of ascertainment; and such are the very claims from which the Bankrupt Act relieves the plaintiff in error.

VII.

"As a general rule every debt recoverable at law or in equity is provable."

Re Jordan, 2 Fed. R. 319.

It is certain that a bankruptcy act may be so framed as to avoid and annul all contracts existing at the time of the bankruptcy, whether the liability of the bankrupt at the time upon such contracts be certain or contingent.

Skelton *v.* Pease, 10 Mo. 478.

As this statute expressly makes the word "debt" equivalent to the terms "demand" and "claim," wherever used in the act, it is to be observed how broadly the language used in clause 4 of Section 63, subdivision *a*, permits the discharge of the bankrupt to operate.

If claims ordinarily termed contingent are provable in bankruptcy, under the broad provisions of this clause of the act, then effect is given to paragraph *b*, which provides for their liquidation. Otherwise, this paragraph can have but little meaning and effect.

If a claim is certain and fixed as to the time and amount, then it is liquidated, and provision for its liquidation is unnecessary and uncalled for.

Paragraph *b* does not enlarge the class of debts which may be proved, but provides that claims within the scope of paragraph *a*, if unliquidated, may be liquidated and proved.

A debt is liquidated when it is certain what is due and how much is due.

Bouvier's Law Dict., Vol. 2, page 263.

It is significant in this connection that in Section 19 of the Act of 1867, the term "liquidation" is applied to contingent debts. By Section 5 of the Act of 1841, it was that class of persons who were annuitants and holders of debts payable in future, *i. e.*, having uncertain and contingent demands, who might have the value of such claims ascertained under the direction of the Court.

Lowell, Treatise on Law of Bankruptcy, page 485.

And the ground upon which uncertain or contingent debts under the early English bankrupt laws and the United States law of 1800 were excluded, was that no mode was provided for their liquidation.

Jemison *v.* Blowers, 5 Barbour (N. Y.), 686.

The Bankrupt Act of 1800 contained no provision for the proof of unliquidated or contingent debts or claims. The Act of 1841 specifically provided for the proof of annuities and uncertain and contingent demands, and the Act of 1867 was even more specific in providing for proof in all cases of contingent debts and contingent liabilities contracted by the bankrupt.

However, the omission of these special provisions found in earlier acts, for the proof of such debts and liabilities, is of the greatest significance where words are found, as in the present case, so general that they necessarily include the particular provisions embraced in prior legislation. It points clearly to the intention on the part of Congress to sweep away the phraseology by which in former acts the various claims and liabilities therein mentioned were made provable, and to substitute therefor such concise yet comprehensive language as would accomplish the same purpose. Such words as those contained in clause 4 of Section 63, *a*, are of such large import as fairly to embrace claims of the character specifically mentioned in the Act of 1867.

A clause similar to clause 4 is not to be found in any of the earlier enactments, but it is highly probable, in view of the history of bankruptcy legislation in this country, that by the comprehensive language of this clause, it was the intention of Congress to bring within the operation of the present act all of the classes of claims which were specifically mentioned in the earlier laws.

It is to be observed that the undoubted trend of legislation of this character has been to broaden the operation to a discharge in bankruptcy. In this respect the Act of 1841 was a distinct advance over the Act of 1800, and the Act of 1867 was more extensive in its operation than the Act of 1841.

So in England successive statutes have continually enlarged the class of debts which may be proved in bankruptcy.

Lowell on Law of Bankruptcy, Sect. 164.

Now, then, we find the word "debt" in this act so defined as to give it the broadest possible signification, and we find it stated that all debts founded upon contracts, expressed or implied, are provable in bankruptcy, and that unliquidated claims may be liquidated under the direction of the Court.

Can it be said that Congress intended to withdraw from the operation of the present act a large class of claims from which it is the policy of all modern bankruptcy laws to free a debtor, when language is used broad enough to permit them to be embraced in the act, merely because they were not specifically mentioned?

It is the purpose of bankruptcy laws to terminate all the contractual relations of the bankrupt.

Lowell, Treatise on the Law of Bankruptcy, page 486.

Nor can it be fairly urged against this contention that clause 4 is dependent upon or to be governed by clause (1) of subdivision *a*, Section 63. On the face of the act they are distinct and independent provisions, and reasonable effect can be given to both by treating them as separate and independent clauses.

Moch *v.* Market St. Nat'l Bank, 107 Fed. Rep. 897.

Therefore, even if the claim of the defendant in error in this case is a contingent one, it is provable under this clause of the act and can be liquidated.

It has been frequently determined that claims of a character similar to the one in suit can be liquidated, and that the discharge in bankruptcy is a bar to recovery upon them. The test laid down in this court with respect to the proof of this class of claims is the possibility of their estimation or valuation.

Riggin *v.* Maguire, 15 Wall. 549.

And it is considered by Judge Lowell in his work on Bankruptcy, Section 167, page 126, that this is the true test.

A bankrupt is released by his discharge from further liability on a covenant for quiet enjoyment, although no breach occurred before bankruptcy.

Jemison *v.* Blowers, 5 Barbour (N. Y.) 686.

A claim upon a bond conditioned on the payment of all the debts of a firm by the continuing partner, where no debts were paid by obligee until after bankruptcy, was "capable of approximate proof," and barred by a discharge of the obligor in bankruptcy.

Fisher *v.* Tifft, 12 R. I. 56.

The obligation to pay an annuity for life by quarter yearly instalments was discharged by bankruptcy of the obligor. With respect to payments which might become due after the petition in bankruptcy was filed, the present value of the liability was ascertainable and provable.

Haywood *v.* Shreve, 44 N. J. Law, 94.

The liability of a subscriber to corporate stock for his unpaid subscription was a provable debt under the Bankrupt Act of 1867, although no assessment had been made at the time of bankruptcy.

Glenn *v.* Abell, 39 Fed. R. 10.

A claim based on a contract right, although for unliquidated damages for loss of future profits, is provable in bankruptcy.

Matter of Manhattan Ice Co., 7 Am. B. R. 408.

In re Stern, 8 Am. B. R. 569.

Claim based on a bond to secure the payment of an annuity to a wife for life held to be provable in bankruptcy. "The payment is clearly one the value of which can be ascertained."

Cobb *v.* Overman, 109 Fed. R. 65.

"Liabilities involving payment or the ceasing to pay at the end of a life or lives in being can always be valued by the

tables of actuaries." Lowell, Treatise on Law of Bankruptcy, 131.

Lowell *v.* St. Louis Life Ins. Co., 111 U. S. 264.
Pierce *v.* Tenn. Coal, etc., Co., 173 U. S. 1.
Parker *v.* Russell, 133 Mass. 74.
Schell *v.* Plumb, 55 N. Y. 592.
Haywood *v.* Shreve, 44 N. J. L. 94.
Cobb *v.* Overman, 109 Fed. 65.
Shrover, Adm., *v.* Myrick, 4 Ind. App. 7.
Ex parte Granger, 10 Ves. 348.
Ex parte Tindal, 1 Dra. & Ch. 291.
Ex parte Bradley, 2 M. D. & De G. 524.
Ex parte Naden (1874), L. R. 9 Ch. 670.

In the Collateral Inheritance Tax Act of Massachusetts, St. 1891, Chap. 425, Sect. 13 (Chap. 15, § 16. Revised Laws), we find a rule laid down for calculating annuities. It is as follows: "The value of an annuity or life estate shall be determined by the actuaries' combined experience tables, and four per cent compound interest."

It is perfectly clear, then, that so far as the liability of the plaintiff in error is one dependent upon the minority of the son and the life of the wife, the case presents a question upon which the law is well settled.

VIII.

But the liability of the plaintiff in error to pay under his covenant "until she marries" raises a question not wholly free from difficulty.

The courts of this country have not dealt with this contingency, so far as search has revealed, but in England this question has been determined and such a liability has been held to be discharged in bankruptcy.

Ex parte Blakemore, 5 Ch. D. 372.
Ex parte Neal *re* Batey, 14 L. R. Ch. Div. 579.

Ex parte Blakemore, 5 Ch. D. 372 (1887), was a case where there was a covenant to pay an annuity during life or widowhood. It was held that the chance of a widow marrying again was not incapable of liquidation and on bankruptcy a provable claim arose upon the covenant. Lord Justice James said: "No doubt it is uncertain whether the appellant will marry again, just as the duration of a particular life is uncertain. I am of the opinion that we cannot judicially declare that this contingency is incapable of being fairly estimated. Like every other contingency affecting human life or human conduct, it is, I think, capable of calculation."

Ex parte Neal, *ubi supra*, was a case where it was held that the value of an annuity dependent upon three different contingencies, viz., chastity, resumption of cohabitation, or dissolution of marriage for the fault of annuitant, was provable in bankruptcy.

The defendant in error was, at the date of the adjudication in bankruptcy, about forty-six years of age, and the probable duration of her life was legally ascertainable. So the maximum of value to her of this covenant when the plaintiff in error was declared a bankrupt was fixed. The uncertainty of widowhood would diminish, not increase, this value. If, then, the greater sum is calculable, why not the lesser? The uncertainty in the one case is no more complete than in the other. If the bankrupt law can relieve him of the burden of one element of this covenant, it can and should of the other. The hardship to the other creditors is no greater than upon many claims the liquidation and proof of which are undoubted.

Lowell, Treatise on Law of Bankruptcy, Sect. 171, p. 130.

Jemison *v.* Blowers, 5 Barbour (N. Y.) 686.

Moch *v.* Market St. National Bank, 107 Fed. Rep. 897.

Matter of Manhattan Ice Co., 7 Am. B. R. 408.

Fisher *v.* Tifft, 12 R. I. 56.

IX.

The claim of the defendant in error was a fixed liability evidenced by an instrument in writing, absolutely owing by the plaintiff in error at the time he filed his petition in bankruptcy, though not then payable, and therefore within the meaning of clause 1 of subdivision *a*, Sect. 63.

While claims of this character have been generally treated as contingent, yet it is submitted that within the meaning of the clause just cited this claim is not contingent.

Looking at the obligations of the plaintiff in error from the point of view of his performance of them we find no contingency, but an absolute fixed liability extending into the future.

It is not a case where it is uncertain when his liability will come into existence, but a case where it is uncertain when it shall cease. Death, marriage, and majority are events which terminate the liability, not create it. It seems to be an erroneous conception of the term "contingent" which has led to treating claims arising upon covenants for annuities as contingent demands.

Payment under this contract was not dependent upon the happening of an event which might never occur.

Wolf *v.* Stix, 89 U. S. 1.

"The word 'contingent,' when applied to a use, remainder, devise, etc., or other legal right or interest, implies that no present interest exists, and that whether such right or interest ever will exist depends upon a future uncertain event." "The term 'contingent demand' would, therefore, be inapplicable where a present claim exists or where it is certain to arise in future, and is only appropriate when there is no claim *in presenti*, and when it is uncertain whether any in fact will arise."

Jemison *v.* Blowers, 5 Barbour (N. Y.) 686; 1 Coke, Thomas' Ed. 121; Comyn's Dig. Tit. Uses, K. 6; 1 Coke, Rep. 30; 2 Comyn, 169.

In Riggin *v.* Maguire, 15 Wall. 549, Mr. Justice Bradley said

that the covenant sued on "did not come within the category of *annuities and debts payable in future, which are absolute existing claims.*" "If it had come within that category, the value of the wife's probability of survivorship after the death of her husband might have been calculated on the *principle of life annuities.*"

As the claim in the case at bar is for annuities, it is an absolute existing claim. It can be liquidated as provided in subdivision *b*, Sect. 63.

X.

The agreement in suit, in so far as it provided for the payment of a certain yearly sum by monthly instalments for the support and maintenance of the son until he shall attain the age of twenty-one years, did not impose a contingent liability on the plaintiff in error. The payment was to cease at a definite fixed time, *i. e.*, when the boy reached the age of twenty-one years. The liability was absolute. At the time of the adjudication in bankruptcy of the plaintiff in error the boy was nearly nineteen years of age, and before the bankruptcy proceedings would, in the regular course, be terminated, the boy would be nearly twenty years of age. It cannot be doubted that the claim of the defendant in error in respect to this part of the contract could be liquidated and proved in bankruptcy. It is therefore, barred by the discharge.

Ex parte Pollard, 2 Lowell, 411.
Riggin *v.* Maguire, 15 Wall. 549.
Cobb *v.* Overman, 109 Fed. R. 65.

In *ex parte* Pollard, 2 Lowell, 411, the bankrupt had agreed to employ one for ten years at a yearly salary, and it was there held that the employee might prove for damages for the breach of the contract caused by the filing of a voluntary petition in bankruptcy by the employer. Judge Lowell said: "One word as to the point that there is some contingency in this contract. I cannot see any. It is an absolute contract for employment, having a determined period and a fixed compensation. *The*

contingent liabilities which the court have always refused to assess are those im which it is uncertain whether there will ever be anything to assess. It is no objection to a proof that the Court or jury may findl difficulty in assessing damages for an absolutely broken contract any more than that there may be complications in an account. If the liability is absolute, there is no more or less difficulty in liquidating it and no less obligation to liquidate it than in any other."

XI.

The instalments for which the defendant in error seeks recovery in this suit are those which accrued from December, 1898, to September, 1899, inclusive, and were therefore instalments which became due within the year after the date of the adjudication.

These instalments accruing within one year after the time of bankruptcy were specifically set forth in the schedule of the debts of the plaintiff in error (Rec., p. 16). The defendant in error had full notice of this when she appeared and proved her claim.

Having voluntarily submitted her claim to the jurisdiction of the bankruptcy court, even if the claim were not provable within the act, the defendant in error is now estopped from saying that the claim was not within the act. She has waived the privileged character of her claim and has determined, by proving for a part of her claim, to come into tho bankruptcy court and obtain her dividend with other creditors as she had a right to do. She cannot now be allowed to insist upon the exemption of her claim from the effect of a discharge.

In this respect the status of the claim is like that of a fiduciary debt. It has been held that if a fiduciary creditor prove his debt, he shall be bound by the discharge.

Chapman *v.* Forsyth, 2 How. 202.
In re Tibbetts, Fed. Cases No. 13817.
Morse *v.* Lowell, 7 Metc. (Mass.) 152.

Burpee *v.* Sparhawk, 108 Mass. 111.
Fisher *v.* Currier, 7 Metc. (Mass.) 424.

The principle laid down by these cases is stated in Fisher *v.* Currier to be that if creditors of this class take the benefit they shall take it with the corresponding burden which the same law that gives it imposes.

Furthermore, in such a contract as the one in this case, there can be but one recovery, as there is but one breach. The plaintiff in error disabled himself by bankruptcy from performing his contract.

In re Swift, 7 Am. B. R. 374.

In fact, long before his bankruptcy he had ceased to make the payments required by the contract. This repudiation of his obligations was communicated to the defendant in error, and she acted upon it by proving for her claim in part. She was entitled and compelled, because of this breach of the entire contract, to have her entire damages assessed at once, and having sought to recover on her demand she must be held to have waived all right to claim for a greater sum than that for which she proved in bankruptcy.

James *v.* Allen County, 44 Ohio St. 226.
Wrubel *v.* Muth, 11 C. C. (Ohio) 559.
Tarbox *v.* Hartstein, 4 Baxt. 78.
Fish *v.* Foley, 6 Hill, 54.

XII.

While relieving the plaintiff in error from the pressure of existing obligations, yet the bankruptcy law divested him of all of his estate to be distributed to his creditors.

In doing so it leaves him to make a fresh start, but without resources.

It is manifestly an injustice which this Court should not construe the law to inflict without the plainest direction, if obligations like those in this case remain to burden the debtor.

It is not contended that a discharge in bankruptcy can relieve the plaintiff in error from any natural duty to the defendant in error or her son, if such a duty existed, but it is maintained that from the obligations of this particular contract the bankruptcy law has freed him.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, A.D. 1902

No. 244

HORACE B. DUNBAR . . . . . Plaintiff in Error

v.

LOTTIE E. DUNBAR . . . . . Defendant in Error

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR

JOHN OSCAR TEELE
FRANK H. STEWART
Attorneys for Plaintiff in Error

Supreme Court of the United States

OCTOBER TERM, 1902.

HORACE B. DUNBAR . . . . . Plaintiff in Error.

v.

LOTTIE E. DUNBAR . . . . . Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

The only federal questions open in this Court are those raised by the assignment of errors (Rec., pp. 8, 9). Upon the issues of collusion and consideration the judgment of the Superior Court of Massachusetts was final and conclusive: hence the report of all the evidence (Rec., pp. 16–49) has no purpose, except as it may throw light on the character of the claims upon which the original action was brought.

The open questions are whether the said Superior Court erred in its judgment: —

FIRST, that the original defendant's discharge in bankruptcy was not a complete bar to the original plaintiff's claim in her own behalf; and, SECOND, that said discharge was not a bar to her claim for the support and maintenance of her (their) minor child, Willie W. Dunbar.

Both claims arose on the agreement declared on (Rec., pp. 3–5).

BRIEF OF THE ARGUMENT.

Points and Authorities.

I.

As to the claim of the original plaintiff in her own behalf.

a. The schedules filed in bankruptcy by the plaintiff in error set out the claims in suit as "alimony due" and "alimony" to become due (Rec., p. 58). Moreover, they were treated as alimony by the parties in their agreement (Rec., pp. 44, 45); in the correspondence (Rec., pp. 46–49); and in the power of attorney (Rec., p. 45).

It is, therefore, submitted for the defendant in error that, upon the whole record, the agreement declared on was intended by the parties as an adjustment out of Court of her claims for alimony, to avoid making it a part of the decree in the divorce suit. Whether it was a collusive proceeding is not now an open question; but it is submitted that this Court should treat the claims as having the character the parties intended them to have, and which they gave them.

Alimony has never been considered a debt provable in bankruptcy in this country, but simply a duty, and as such is not barred by the discharge.

Audubon v. *Schufeldt*, 181 U. S. 575.
Lynde v. *Lynde* (1901), 181 U. S. 183.
Barber v. *Barber* (1858), 21 How. 582.
In re Lachemeyer, Fed. Cases, 7966.
In re Garrett, Fed. Cases, 5252.
In re Baker, 96 Fed. 955.
In re Sheppard, 97 Fed. 187.
In re Anderson, 97 Fed. 321.
In re Hubbard, 98 Fed. 710.

These cases were exhaustively reviewed and the rule ap-

proved in *Re* Nowell, 99 Fed. 931, which was cited with approval by this Court in *Audubon* v. *Schufeldt, ubi supra.*

b. But we submit it is not necessary in this case to consider whether the wife's claims are strictly alimony, or even in the nature of alimony, in order to determine whether the State Court erred. The judgment complained of was rendered upon the ground that they were contingent claims, and so not provable under the Bankrupt Act of 1898.

Dunbar v. *Dunbar*, 180 Mass. 170.

The wife's claim in her own direct behalf was contingent (*a*) upon her death, and (*b*) upon her remarriage. The obligation is a continuing liability; and new breaches give new causes of action, which are not provable under the proceedings in bankruptcy.

Austin v. *Moore*, 7 Met. (Mass.) 116.
Shute v. *Taylor*, 5 Met. (Mass.) 67.
Waldo v. *Fobes*, 1 Mass. 10.

As the Act makes no provision for the proof of claims depending upon a contingency which does not happen before the time of the adjudication of the bankruptcy, this claim could not be proven at all unless as an unliquidated one.

In re Big Meadows Gas Co., 113 Fed. 974.

But liquidation was impossible.

Unlike all other bankruptcy laws, in this country and in England, the Act of 1898 does not deal specifically with contingent claims.

In re Ells, 98 Fed. 967, 968.

Debts "absolutely owing" (30 Stat. L. 563) do not include contingent claims, whether they are capable of liquidation or not. Liquidation apart from contingencies is simple enough

when life or actuaries tables can be availed of. But how will the Court liquidate a wife's claim limited upon the contingency of her remarriage? For what per cent. is interest to be rebated to find present value or "present worth"? Will the Court undertake to hazard a guess as to the probabilities in the case of an attractive woman of thirty or in the case of an ugly woman of sixty? As long as there are no means of removing the uncertainty by calculation, such claim is not provable.

Ex parte Pollard, 2 Lowell, 411.
Riggin v. *Magwire*, 15 Wall. 549.

Under the English statutes of bankruptcy down to 1869 such contingent claims were held not to be provable, and so not barred.

Millen v. *Whittenbury*, 1 Camp. 428.
Overseers of St. Martin's v. *Warren*, 1 B. & Ald. 491.
Mills v. *Auriol*, 1 H. Bl. 433.
Mudge v. *Rowan*, 3 Law Rep. Ch. Div. 85.

The English Act of 1869, however, enlarged the language of claims provable, so as to make "every kind of a debt or liability provable in bankruptcy except demands in the nature of unliquidated damages arising otherwise than by reason of a contract or promise," and that whether the liability is "capable of being ascertained by fixed rules, or assessed only by a jury, or as a matter of opinion."

Ex parte Blakemore, 5 Ch. Div. 372.
Ex parte Neal, *Re* Batey, 14 Law Rep. Ch. Div. 579 (1880).

Under that statute claims of this nature were held to be provable, and so barred; but these cases are not of authority in this country, since the English Bankrupt Law "permitted the proof of contingent debts . . . to an extent outside the

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utmost possibility of the construction of the present bankrupt act of the United States."

In re Nowell, 99 Fed. 931, 933.

See also: *In re* Ells, 98 Fed. 967.
In re Arnstein, 101 Fed. 706.
In re Mahler, 105 Fed. 428.
In re Jefferson, 93 Fed. 948.
In re Garlington, 115 Fed. 999.
Morgan v. *Wordell*, 178 Mass. 350.
Godding v. *Roscenthal* 180 Mass. 43.
Ex parte Lake, 2 Lowell, 544.

The only reference in the Act of 1898 to contingent claims, even by construction, other than that of the surety of a bankrupt (Sect. 57i) is contained in Section 63b. This paragraph, however, does not in any way enlarge the class of debts which may be proved, but provides that, if any claim coming within the scope of Section 63 is unliquidated, it may be liquidated and proved.

30 Stat. L. 563.
Lowell on Bankruptcy, p. 487.
In re Hirschman, 104 Fed. 69.
In re Yates, 114 Fed. 365.
In re Marcus, 104 Fed. 331.

If it be conceded that in this case the damages were liquidated by the parties, it was for common law purposes, and does not reach that different and independent liquidation which the law of bankruptcy provides for the purposes of proof. Such statute liquidation is remedial, and it is useless to say that in the statute sense these claims were liquidated, and so provable; for, being contingent, they were not provable at all. They were unliquidated in that sense; but it is immaterial, for the element of contingency was fatal to their proof, whether liquidated by the parties or not, and whether or not

they were otherwise subject to liquidation under the statute for purposes of proof. The contingency was of such a nature that it could not be valued for the purposes of proof under any bankrupt law existing or known to the history of the law, except perhaps the English Act of 1869, and even under that Act alimony was not provable.

Kerr v. *Kerr*, 2 Q. B. 439.
Hawkins v. *Hawkins*, 1 Q. B. 25.
Linton v. *Linton*, 15 Q. B. D. 239.

II.

As to the original plaintiff's claim for support and maintenance of their minor child.

The claim was payable directly to her, and was so specified in the contract. Much that has been said above as to her claim for her personal benefit applies with equal force to this branch of the claims sued on, which the Superior Court and the Supreme Judicial Court in their final judgment treated as a contingent claim, and so not within the language of the Act of 1898 as to provable claims.

But there is another and independent ground on which this claim should be supported, even if it was not a part of the alimony stipulated for. There is no reason in equity or good conscience why a covenant voluntarily entered into for the support of a minor child should not be held good as against bankruptcy; for the liability is a continuing one, and the consideration — to wit, the natural and common law obligation — is constant, and is not *determined* by the bankruptcy, as in most other cases. If this claim cannot be treated as alimony, it should not be held barred; for it was grounded upon a natural and legal obligation continuing after the bankruptcy proceedings, and was peculiar only in that the amount of the liability was fixed in advance. The relations between parent

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and child, and the parent's liabilities, must be worked out independently of all bankruptcy laws.

Millen v. *Whittenbury*, 1 Camp. 428.
In re Baker, 96 Fed. 954.
In re Hubbard, 98 Fed. 710.
In re Cotton, Fed. Cases, 3269.
In re Garrett, Fed. Cases, 5252.
In re Lachemeyer, Fed. Cases, 7966.

"The bankruptcy act was passed to relieve persons bringing themselves within its provisions from the incubus of hopeless indebtedness; but it was not intended to, nor does it, subvert the higher rule, which casts upon a parent the care and maintenance of his offspring. The welfare of the State, as also of every principle of law, statutory, natural, and divine, demand that, so long as he has any substance at all, he shall apply it to the maintenance of his children. Creditors, as well as all citizens, are interested in the enforcement of this rule."

Kohlsaat, D. J., *in re* Hubbard, 98 Fed. 710.

Whether or not in this case the force of the obligation to support the child after the decree of divorce, the mother having the custody, continued as to her or as to the rest of the world, it is not now material to inquire; for the father recognized and revived this obligation by his express covenant after the decree.

It is respectfully submitted that the judgment of the Superior Court of the Commonwealth of Massachusetts ought to be affirmed.

JOHN OSCAR TEELE,
FRANK H. STEWART,

Attorneys for Defendant in Error.

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Supreme Court of the United States.

No. 244.—October Term, 1902.

Horace B. Dunbar, Plaintiff in Error, vs. Lottie E. Dunbar. } In error to the Superior Court of the State of Massachusetts.

[June 1, 1903.]

The defendant in error, being the plaintiff below, brought her action in October, 1899, against the plaintiff in error, in the Municipal Court of Boston, to recover moneys alleged to be due upon a contract, which was set forth in the complaint. Issue was joined and the case tried before a single justice, and judgment ordered for the defendant with costs. An appeal was taken to the Superior Court of the county of Suffolk, and that court ordered judgment for the plaintiff for one branch only of her claim. The case was reported to the Supreme Judicial Court for the Commonwealth, and that court ordered the court below to enter judgment for the plaintiff for both branches of her claim, (180 Mass. 170,) and the case was remanded to the Superior Court for the purpose of entering such judgment. Pursuant to the directions of the Supreme Court, the Superior Court did enter judgment against the defendant for both branches of her claim, for the sum of $851.60 and costs. The defendant then obtained a writ of error from this court, directed to the Superior Court of Massachusetts, where the record remained.

The case shows these facts: The parties were husband and wife, who, in 1889, were living apart, the husband in Ohio and the wife in Massachusetts. In May, 1889, the attorney for her husband came to Massachusetts and saw Mrs. Dunbar, and told her that her husband was about to seek a divorce from her. The wife at this time had no means, and the two sons of the marriage, then respectively nine and twelve years old, were living with her. The purpose of the visit of the attorney was to obtain some assurance from her that she would not contest the case, and if she did not that the husband would make provision for aiding in the support of herself and her sons until they arrived of age. The wife denied any intended desertion of her husband, but the result of the negotiations after the wife had taken counsel of friends was to give assurance to the attorney that no defense would be interposed if he made some suitable provision for herself and her children.

Upon the return of the attorney to Ohio, a suit for divorce was commenced by the husband, and the summons served by publication. No appearance was made and there was no opposition to the decree of divorce which was obtained in July, 1889. It adjudged that the marriage contract theretofore existing between the parties was thereby dissolved, and both parties released from the obligation of the same, and "that the custody of the children of such marriage, one boy, Harry H. Dunbar, aged 12 years, and Willie W. Dunbar, aged 9 years, be, and the same are, to remain in charge and under the control of the said Lottie E. Dunbar, the said Horace B. Dunbar to have the privilege of seeing said children at all reasonable times."

The ground of divorce was stated, and the court found "upon the evidence adduced that the defendant has been guilty of wilful absence for more than three years last past from plaintiff, and that, by reason thereof, the plaintiff is entitled to a divorce as prayed for."

After the divorce the husband sent to a friend of his wife, to be delivered to her in performance of his agreement, a written contract, in which he bound himself to pay to Lottie E. Dunbar, of Ashburnham, Mass., five hundred dollars yearly, so long as she remained unmarried, in monthly installments. In that contract he also agreed to pay "to our children, Harry H. Dunbar and Willie W. Dunbar, the sum of two hundred and fifty dollars each yearly, until they each attain the age of fourteen years; after that age they are to be paid by me such extra allowance as will give them a good and sufficient education befitting their station in life, and a suitable maintenance until each attains the age of twenty-one years." This writing was signed by the husband and acknowledged before a notary public of Hamilton, Ohio.

Payments upon this contract, were made by the husband, but in 1896 they had become somewhat in arrears, and disputes arose as to the validity of the agreement. Thereafter another contract was entered into and payments were made as called for in that contract until some months prior to December 2, 1898. On such last named date the defendant was adjudged a bankrupt, on his voluntary petition in bankruptcy, in the United States District Court in Bankruptcy, Southern District of Ohio, Western Division, and on April 24, 1899, was discharged from all debts and claims provable under the act of Congress, relating to bankruptcy, against his estate, existing on the 2d day of December, 1898.

In the schedule of the defendant it appeared that he named the plaintiff as a creditor, as follows:

Lottie E. Dunbar, Charlestown, Mass..... $540
Alimony due up to present time.
Lottie E. Dunbar, Charlestown, Mass..... 1,300
Alimony payable yearly.

The plaintiff at the first meeting of the creditors in bankruptcy proceedings, which was held before a referee appointed therein, appeared by an attorney, who produced and filed his power of attorney, and filed her claim for $691.63, for installments on the contract due to December 2, 1898. The husband had paid nothing on the contract since some time before December 2, 1898, and finally the wife commenced an action to recover the amounts due thereon.

The following is a copy of the contract sued on:

"Controversies having arisen concerning the agreement heretofore made between Horace B. Dunbar and Lottie E. Dunbar in September, 1899, in consideration of said Lottie E. Dunbar's forbearance of suit on such controversies, and in settlement of all such controversies and in substitution of said agreement of September, 1889, and in further consideration of the release by Lottie E. Dunbar and in satisfaction of all claims under said original agreement, Horace B. Dunbar agrees with the said Lottie E. Dunbar as follows:

"That said Horace B. Dunbar will pay to Lottie E. Dunbar during her life, or until she marries, for her maintenance and support, yearly, the sum of five hundred dollars, and will pay to her yearly for the support and maintenance of her child, Harry H. Dunbar, the sum of four hundred dollars until he shall attain the age of twenty-one years; and shall pay to her yearly for the support and maintenance of her child, Willie W. Dunbar, the sum of four hundred dollars until he shall attain the age of twenty-one years, all said sums to be paid in equal monthly installments between the first and tenth of each and every month—the first installment being for the month of May, 1896, shall be paid between the first and tenth of June, 1896.

"And, in addition to the foregoing, said Horace B. Dunbar agrees to pay the further sum of one hundred dollars between the first and tenth of July, 1896, over and above the installment otherwise due for said month.

"And the said Lottie E. Dunbar hereby agrees that she has not nor shall she have any other claim or demand against Horace B. Dunbar for contribution to her support and maintenance, or for the support, maintenance or education of said children, save and except as fixed and limited by this agreement."

Properly signed by both parties and witnessed.

The particulars of her claim were stated as follows:

"Horace B. Dunbar to Lottie E. Dunbar,	Dr.
1. To installments due under covenant for alimony from December, 1898, to October 1, 1899, ten months, at $41.66 a month	$416 60
2. To monthly allowance due her for support and maintenance of Willie W. Dunbar, from December, 1898, to October 1, 1899, ten months, at $33.33 a month	333 30
	$749 90"

The defendant pleaded his discharge in bankruptcy as a bar, and the Supreme Judicial Court of the State held that it was not good.

Mr. Justice PECKHAM, after making the foregoing statement of facts, delivered the opinion of the Court.

Had the provisions of this contract, so far as contracting to pay money for the support of his wife is concerned, been embodied in the decree of divorce which the husband obtained from his wife in Ohio on the ground of desertion, the liability of the husband to pay the amount as alimony, notwithstanding his discharge in bankruptcy, cannot be doubted. (*Audubon* v. *Shufelt*, 181 U. S. 575.) We are not by any means clear that the same principle ought not to govern a contract of this nature when, although the judgment of divorce is silent upon the subject, it is plain that the contract was made with reference to the obligations of the husband to aid in the support of his wife, notwithstanding the decree. The facts appearing in this record do not show a case of any moral delinquency on the part of the wife, and the contract, considering the circumstances, might possibly be held to take the place of an order or judgment of the court for the payment of the amount, as in the nature of a decree for alimony. We do not find it necessary, however, to decide that question in this case, because in any event we think the contract as to the support of the wife is not of such a nature as to be discharged by a discharge in bankruptcy.

Conceding that the bankruptcy act provides for discharging some classes of contingent demands or claims, this is not, in our opinion, such a demand. Even though it may be that an annuity dependent upon life is a contingent demand within the meaning of the bankruptcy act of 1898, (30 Stat. 544,) yet this contract, so far as regards the support of the wife, is not dependent upon life alone, but is to cease in case the wife remarries. Such a contingency is not one which in our opinion is within the purview of the act, because of the innate difficulty, if not impossibility, of estimating or valuing the particular contingency of widowhood. A simple annuity which is to terminate upon the death of a particular person may be valued by reference to the mortality tables. Mr. Justice Bradley, in *Riggin* v. *Magwire*, (15 Wall. 549,) speaking for the court, said that so long as it remained uncertain whether a contract or engagement would ever give rise to an actual duty or liability, and there was no means of removing the uncertainty by calculation, such contract or engagement was not provable under the bankruptcy act of 1841. The fifth section of that act gave the right to prove "uncertain and contingent demands," but it was held that a contract such as above described was not within that section.

It was remarked by the justice in that case that if the contract had come within the category of annuities and debts payable in future, which are absolute and existing claims, that the value of the wife's probability

of survivorship after death of her husband might have been calculated on the principles of life annuities.

But how can any calculation be made in regard to the continuance of widowhood when there are no tables and no statistics by which to calculate such contingency? How can a valuation of a probable continuance of widowhood be made? Who can say what the probability of remarrying is in regard to any particular widow? We know what some of the factors might be in the question; inclination, age, health, property, attractiveness, children. These would at least enter into the question as to the probability of continuance of widowhood, and yet there are no statistics which can be gathered which would tend in the slightest degree to aid in the solving of the question.

In many cases where actions are brought for the violation of contracts, such as *Pierce* v. *Tennessee Coal &c. Railroad Company*, (173 U. S. 1;) *Roehm* v. *Horst*, (178 Id. 1,) and *Schell* v. *Plumb*, (55 N. Y. 592,) it is necessary to come to some conclusion in regard to the damages which the party has sustained by reason of the breach of the contract, and in such cases resort may be had to the tables of mortality, and to other means of ascertaining as near as possible what the present damages are for a failure to perform in the future, but we think the rules in those cases are not applicable to cases like this under the bankruptcy act.

Taking the liability as presented by the contract, if the mortality tables were referred to for the purpose of ascertaining the value so far as it depended upon life, the answer would be no answer to the other contingency of the continuance of widowhood; and if having found the value as depending upon the mortality tables you desire to deduct from that the valuation of the other contingency, it is pure guesswork to do it.

It is true that this has been done in England under the English bankruptcy act of 1869. In *Ex parte Blakemore*, (L. R. 5 Ch. D. 372; 1877,) it was held by the court of appeal that the value of the contingency of a widow's marrying again was capable of being fairly estimated, and that proof must be admitted for the value of the future payments as ascertained by an actuary. That decision was made under the thirty-first section of the bankruptcy act of 1869. James, Lord Justice, said:

"No doubt it is uncertain whether the appellant will marry again, just as the duration of any particular life is uncertain. But, though the duration of any particular life is uncertain, the expectation of life at a given age is reduced to a certainty when we have regard to a million of lives. The value of the expectation of life is arrived at by an average deduced from practical experience."

Although the English statute makes it necessary to arrive at a conclusion upon this point, yet there is no "practical experience" as to the chances of the continuance of widowhood, such as may be referred to where the probable continuance of life is involved. In the latter case we have the experience

tables in regard to millions of lives, and under such circumstances there is, as Lord Justice James said, almost a certainty as to the valuation to be put on such a contingency. But under the English statute, the thirty-first section makes every kind of debt or liability provable in bankruptcy except demands in the nature of unliquidated damages arising otherwise than by reason of a contract or promise, so long as the value of the liability is "capable of being ascertained by fixed rules, or assessable only by a jury, or as matter of opinion." So under that act, in *Ex parte Neal,* (L. R. 14 Ch. D. 579,) there was a separation deed between husband and wife, and the husband was to pay an annuity to the wife, which was terminable "in case the wife should not lead a chaste life; in case the husband and wife should resume cohabitation; and in case the marriage should be dissolved in respect of any thing done, committed or suffered by" the other party, after the date of the deed. The annuity was also to be proportionately diminished in the event of the wife's becoming entitled to any income independent of the husband, exceeding a certain amount a year. After the execution of the deed the husband went through bankruptcy, and it was held that the value of the annuity was capable of being fairly estimated, and was provable in the liquidation. In that case, speaking of the thirty-first section of the act of 1869, it was stated that "words more large and general it is impossible to conceive; they cover every species of contingency." It was also stated that it was "difficult to see how any case could arise which would not come within" the language of this act. Bramwell, Lord Justice, said: "But for the present Bankruptcy Act our decision must have been the same as that in *Mudge* v. *Rowan,*" (L. R. 3 Ex. 85; 1868,) but he said that the present bankruptcy act was very different in its terms from the act which was in force when that case was decided.

In the case of *Mudge* v. *Rowan, (supra)* there was a deed of separation between husband and wife, in which the husband covenanted to pay an annuity to his wife by quarterly installments, the annuity to cease in the event of future cohabitation by mutual consent. It was held that this was not an annuity provable under the bankruptcy act of 1849, 12th and 13th Vic. ch. 106, section 175; nor a liability to pay money under the 24th and 25th Vic. ch. 134, section 154.

The one hundred and seventy-fifth section of the act of 1849 expressly provided that the creditor might prove for the value of any annuity, which value the court was to ascertain. Kelly, Chief Baron, said:

"The annuity seems to me to be so uncertain in its nature as to be impossible to be valued. In many cases the Commissioner of Bankruptcy may have to deal with contingencies the value of which depends upon a variety of circumstances, and where the valuation is very difficult. But here I am at a loss to see any single circumstance upon which a calculation of any kind could be based."

Martin, Baron, said:

"This contingency depends upon an infinite variety of circumstances, into which it is idle to suppose a commissioner could inquire."

Channell, Baron, concurring, said:

"The tendency of recent legislation, and the course of recent decisions, has been to free a debtor who becomes a bankrupt, from all liability of every kind; but I do not think an order of discharge a bar to such a claim as the present. . . . I quite admit that, to bring an annuity within the act of 1849, it is not necessary to have any actual pecuniary consideration. I also feel that in many cases the difficulty of calculating the present value of contingencies may be very great, and yet they may be within the acts. But here it appears to me that the difficulty is insuperable."

In *Parker* v. *Ince*, (4 H. & N. 52; 1859,) there was a bond conditioned to pay an annuity during the life of the obligor's wife, provided that if the obligor and his wife should at any time thereafter cohabit as man and wife the annuity should cease, and it was held that the annual sum thus covenanted to be paid by the defendant was not an annuity within the one hundred and seventy-fifth section of the bankruptcy law or consolidation act of 1849, nor a debt payable upon a contingency within the one hundred and seventy-seventh section, nor a liability to pay money upon a contingency within the one hundred and seventy-eighth section, and consequently the discharge in bankruptcy was no bar to an action for a recovery of a quarterly payment due on the bond. Martin, Baron, said:

"That cannot be such an annuity as would fall within the one hundred and seventy-fifth section, because a value cannot be put upon it. How is it possible to calculate the probability of a man and his wife who are separated living together again? Their doing so depends upon their character, temper and disposition, and it may be a variety of other circumstances. Then is it money payable upon a contingency within the one hundred and seventy-eighth section? I think it is not."

It is only, therefore, by reason of the extraordinarily broad language contained in the thirty-first section of the English bankruptcy act of 1869 that the English courts have endeavored to make a fair estimate of the value of a contract based on the continuance of widowhood, even though the value was not capable of being ascertained by fixed rules, nor assessable by a jury, but was simply to be estimated by the opinion of the court or of sone one entrusted with the duty.

In the *Blakemore case*, (*supra*,) after the announcement of the judgment, the report states that it was then arranged that it should be referred to an actuary to ascertain the annuity as a simple life annuity, and to deduct from that value such a sum as he should estimate to be the proper deduction for the contingency of widowhood. In other words, it was left to the actuary to guess the proper amount to be deducted.

No such broad language is found in our bankruptcy act of 1898. Section 63*a* provides for debts which may be proved, which, among others, are (1) "A fixed liability, as evidenced by a judgment or instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with interest thereon which would have been recoverable at that date, or with a rebate of interest on such as were not then payable and did not bear interest." (4) "founded upon an open account or upon a contract, express or implied."

In section 63*b* provision is made for unliquidated claims against the bankrupt, which may be liquidated upon application to the court in such manner as it shall direct, and may thereafter be proved and allowed against his estate. This paragraph *b*, however, adds nothing to the class of debts which might be proved under paragraph *a* of the same section. Its purpose is to permit an unliquidated claim, coming within the provisions of section 63*a*, to be liquidated as the court should direct.

We do not think that by the use of the language in section 63*a* it was intended to permit proof of contingent debts or liabilities or demands the valuation or estimation of which it was substantially impossible to prove.

The language of section 63*a* of the act of 1898 differs from that contained in the bankruptcy act of 1867, and also from that of 1841. The act of 1867, section 19, (14 Stat. 517, 525, carried into the Revised Statutes as section 5068,) provided expressly for cases of contingent debts and contingent liabilities contracted by the bankrupt, and permitted applications to be made to the court to have the present value of the debt or liability ascertained and liquidated, which was to be done in such manner as the court should order, and the creditor was then to be allowed to prove for the amount so ascertained.

Section 5 of the act of 1841 (5 Stat. 440) provides in terms for the holders of uncertain or contingent demands coming in and proving such debts under the act. But neither the act of 1841 nor that of 1867 would probably cover the case of such a contract as the one under consideration.

Cases have been cited showing some contingent debts which were held capable of being proved under the bankruptcy act of 1898, among which are *Moch* v. *Market Street National Bank*, (107 Fed. Rep. 897, Circuit Court of Appeals, Third Circuit, 1901,) and *Cobb* v. *Overman*, (109 Fed. Rep. 65, Circuit Court of Appeals, Fourth Circuit, 1901.) And under former bankrupt acts, the cases of *Fisher* v. *Tiffi*, (12 R. I. 56; 1878;) *Heywood* v. *Shreve*, (44 N. J. L. 94; 1882,) and *Shelton* v. *Pease*, (10 Mo. 473; 1847.)

The contingency in the case of *Moch* v. *National Bank*, (*supra*,) was that the bankrupt was the endorser of commercial paper not due at the time of filing the petition, and it was held that under section 63*a*, sub-

division 4, the creditor might prove against the estate of the bankrupt after the liability had become fixed.

In *Cobb* v. *Overman*, (*supra*,) the bond of the bankrupt to secure payment to the obligee of an annuity for life was held to be properly proved under section 63*a*, clause 1.

These cases, it will be seen, do not come within the principle of the case at bar. The other cases, arising under the acts of 1867 and 1841, do not affect this case.

The Massachusetts court held the debt herein not provable, upon the authority of *Morgan* v. *Wordell*, (178 Mass. 350,) and *Goding* v. *Roscenthal*, (180 Mass. 43.) Mr. Justice Barker, in delivering the opinion of the Supreme Judicial Court of Massachusetts in the latter case, said:

"But in *Morgan* v. *Wordell*, (178 Mass. 350,) this court assumed that such claims were not provable under the act, and we follow that view in the present case."

We think the contract, so far as it related to the payment to the wife during her life or widowhood, was not a contingent liability provable under the act of 1898.

In relation to that part of the husband's contract to pay for the support of his minor children until they respectively became of age, we also think that it was not of a nature to be proved in bankruptcy. At common law, a father is bound to support his legitimate children, and the obligation continues during their minority. We may assume this obligation to exist in all the States. In this case the decree of the court provided that the children should remain in the custody of the wife, and the contract to contribute a certain sum yearly for the support of each child during his minority was simply a contract to do that which the law obliged him to do; that is, to support his minor children. The contract was a recognition of such liability on his part. We think it was not the intention of Congress, in passing a bankruptcy act, to provide for the release of the father from his obligation to support his children by his discharge in bankruptcy, and if not, then we see no reason why his contract to do that which the law obliged him to do should be discharged in that way. As his discharge would not in any event terminate his obligation to support his children during their minority, we see no reason why his written contract acknowledging such obligation and agreeing to pay a certain sum (which may be presumed to have been a reasonable one) in fulfillment thereof should be so discharged. It is true his promise is to pay to the mother, but on this branch of the contract it is for the purpose of supporting his two minor children, and he simply makes her his agent for that purpose.

In re Baker, (96 Fed. Rep. 954,) in the District Court of Kansas, it was held that a judgment in a bastardy proceeding against the putative father,

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adjudging him to pay a certain sum to the mother of the child for its maintenance, was not such a debt as would be released by the discharge of the father in bankruptcy, and it was put upon the ground that by virtue of the judgment and bond given thereon, the father became liable for the maintenance of the illegitimate son the same as if he were his legitimate offspring, and that the bankruptcy law was never intended to affect the liability of the father for the support of his children.

In the case of *In re Hubbard*, (98 Fed. Rep. 710,) the District Court of Illinois held that a discharge in bankruptcy did not release the bankrupt from the obligation to obey an order made by a State court requiring him to pay a certain sum for the support of his minor children. Kohlsaat, District Judge, said:

"The bankruptcy act was passed to relieve persons bringing themselves within its provisions from the incubus of hopeless indebtedness, but it was not intended to nor does it subvert the higher rule, which casts upon a parent the care and maintenance of his offspring. The welfare of the State, as also every principle of law, statutory, natural and divine, demand that, so long as he has any substance at all, he shall apply it to the maintenance of his children, Creditors, as well as all citizens, are interested in the enforcement of this rule."

As the defendant would still remain liable for the support of his minor children, even if discharged from this contract under the act, and he would remain liable for past support, why should it be held that Congress intended that such a contract, to do what the law enjoins upon him as a duty, should be released? There is no language in the act which plainly so provides, and we ought not to infer it.

The amendments to the bankruptcy act passed in 1903 (32 Stat. 797) contain an amendment of section 17 of the act of 1898, which relates to debts not affected by a discharge, and it provides, among those not released by a discharge in bankruptcy, a debt due or to become due for alimony, or for the maintenance or support of wife or child. It is true that the provisions of the amendatory act are not to apply to cases pending before their enactment. They are only referred to here for the purpose of showing the legislative trend in the direction of not discharging an obligation of the bankrupt for the support and maintenance of wife or children.

The judgment is *Affirmed.*

True copy.

Test:

Clerk Supreme Court, U. S.